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Equity No. 2181.

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT.

THE OREGON AND CALIFORNIA
RAILROAD COMPANY, a Corpor-
ation,

Complainant and Appellant,
VS.

MARIA DE GRUBISSICH, NEE MA-
RIA DE POURTALES,

Defendant and Appellee.

Upon Appeal from the United States District Court
for the District of Oregon.

Brief of Appellee

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APPELLANT'S ASSIGNMENT OF ERRORS
IS INSUFFICIENT.

The assignment of errors does not "set out separately and particularly each error asserted and intended to be urged," as required by Rule 11; and the speci-

fications of error in appellant's brief do not state "as particularly as may be, in what the decree is alleged to be erroneous," as required by Rule 24. The assignments are vague, indefinite, and uncertain, and there is nothing pointed out to indicate to the court or appellee's counsel the nature of the errors asserted, or the reasons or grounds on which it may be contended they exist.

"Assignments of error are required as well in cases brought into a reviewing court by appeal as in cases brought up by writ of error, and such assignments of error clearly must be directed to the rulings of the court."

Randolph vs. Allen, 73 Fed. Rep. 29;

Farrar vs. Churchill, 135 U. S. 609;

Sovereign Camp of Woodman vs. Jackson,
97 Fed. 382;

Chandler vs. Pomeroy, 96 Fed. 156.

The court will of course, and of its own motion, notice the insufficiency of an assignment of error under the rule, and will not concern itself to investigate errors generally averred.

"A mere general assignment of error that the evidence was insufficient, or that the judgment was not supported by the evidence, presents no question for review."

2 *Cyc. of Law and Pro.*, p. 988;

Grand Trunk vs. Ives, 144 U. S. 402;
Van Stone vs. Stilwell, 142 U. S. 128;
Florida Cent. & P. R. Co. vs. Cutting, 68
 Fed. 586;
McFarlane vs. Golling, 76 Fed. 23;
Oswego Township vs. Travelers' Ins. Co.,
 70 Fed. 224;
Richardson vs. Walton, 61 Fed. 535;
United States vs. Ferguson, 78 Fed. 103;
U. S. vs. Stone & Downer Co., 175 Fed. 33;
C. M. & St. P. Ry. Co. vs. Anderson, 162
 Fed. 901.

"It is familiar law on this subject that a general assignment of error should be disregarded, because it does not advise the adversary as to what he has to defend, and unduly taxes the time and effort of the reviewing tribunal. On this view rule 11 is founded and applied."

Florida Cent. & P. R. Co. vs. Bucki, 68 Fed. 864.

"These assignments do not comply with the rules, as they fail to point out any particular error asserted and intended to be urged. Whether they mean that a wrong result was reached because the facts were erroneously decided, or because the court erred in applying the law to the facts, can only be conjectured."

United States vs. Ferguson, 78 Fed. 107;
Garrett vs. Pope Motor Car Co., 168 Fed.
 905.

"An assignment cannot be good, under the rule, if it is necessary to look beyond its terms, to the brief, for a specific statement of the question sought to be presented."

Grape Creek Coal Co. vs. Farmers' L. & T. Co., 63 Fed. 894.

See also:

Doe vs. Waterloo Min. Co., 70 Fed. 461;
United States vs. Ferguson, 78 Fed. 193;
Sovereign Camp, etc. vs. Jackson, 97 Fed.
 382.

"Assignments and specifications of error were required for the purpose of informing the court and the counsel for the opposing party what questions would be presented for consideration and review in the appellate court. An assignment which fails to point out these questions—one which compels the court and counsel to look further and to search the brief in order to discover them—entirely fails to accomplish the purpose of its being, and is utterly futile. The assignment and the specification in the case at bar are apt illustrations of such a failure. They sug-

gest none of the questions of law or of fact which the argument contained in the brief presents for our consideration."

Sovereign Camp, etc. vs. Jackson, 97 Fed. 385.

The assignments of error are set out and quoted in the opinion in the case last cited, and it will be found by comparing them with the assignments in the case at bar that the latter are no less general, uncertain, or insufficient, under the rule, than those which the court refused to consider in that case .

In the present case, the *first* assignment is a mere general averment that the court erred in decreeing that the complainant's bill should be dismissed, and is clearly insufficient for any purpose.

In the *second* assignment appellant undertakes to particularize by limiting the application of the general averment that the court erred in deciding the cause against the plaintiff, to one issue which the court held plaintiff had failed to prove, viz., "and particularly in holding, adjudging or decreeing that the complainant had failed to prove the alleged agreement of March 28, 1870," etc. This amounts simply to a criticism of the decision of the District Court to the effect that upon the issue therein referred to the court ought to have found in favor of the plaintiff, rather than in favor of the defendant. Why the court ought to have so found—whether because the evidence addressed to the issue was of sufficient weight or pre-

ponderance upon a conflict to establish the fact; or whether in applying the law to the evidence offered to sustain the issue on behalf of plaintiff the court erroneously held it incompetent and inadmissible to prove the fact — is not made apparent. This court is left to its own devices, and to an examination and search of the entire record to discover, if it can, the reason why it was error to decide “that the complainant had failed to prove the alleged agreement of March 28, 1870” and counsel for appellee are left to guess and conjecture what reason appellant’s counsel will present and urge to show the existence of the alleged error, and what this court may find in its examination and search of the entire record as a reason why such an error does or does not exist. For these reasons this assignment should be disregarded.

Hart vs. Bowen, 86 Fed. 877;

Florida Cent. & P. R. Co. vs. Cutting, 68 Fed. 586;

Louisiana, etc. vs. Board of Levee Com’rs, 87 Fed. 594;

Garrett vs. Pope Motor Car Co., 168 Fed. 905.

In *Chandler vs. Pomeroy*, 96 Fed. 156, 159, the court, considering an assignment of like nature, said:

“It virtually calls for a review and re-examination of the entire subject matter, without assigning any specific error made by the court, other than the entering of its decree, and the failure to enter one for the complainants.”

Limiting the general averment that the court erred in deciding the case against plaintiff to one particular issue and without specifying any reason therefor, does not serve the purpose of the rule any better than by applying it to the whole cause.

“Findings of fact by the court in a bill in equity must on appeal be considered *prima facie* correct, and will not be disturbed unless plain and manifest error be shown.”

Metropolitan Nat. Bank vs. Rogers, 53 Fed. 776;

Kimberly vs. Arms, 129 U. S. 525;

Camden vs. Stuart, 144 U. S. 105;

Crawford vs. Neal, 144 U. S. 558;

Furrer vs. Ferris, 145 U. S. 132.

In its function as a pleading as assignment to be sufficient must by its own express terms distinctly point out and specify the grounds upon which it is claimed the *prima facie* correctness of fact is counter-vailed. If it is because the finding of fact is against the manifest weight of the evidence, that should be so stated, and so that discussion may be limited to that question and confined to the evidence addressed to the particular issue of fact involved in the finding. If it is because the evidence offered to prove the fact was, under the application of the law and tested by the rules of legal evidence, held incompetent and inadmissible, and was therefore rejected, that should be so stated and specified; and if the latter were the basis of error complained of, then under Rule 11:

“When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected.”

Davidson S. S. Co. vs. United States, 142
Fed. 315; ,
Craig vs. Dorr, 145 Fed. 307.

The present case was tried and decided in the District Court upon the whole record, which is a very large one, and a final decree was rendered. It is not brought here by this appeal to be tried *de novo*, but to have it ascertained and determined whether the lower court in arriving at the conclusions there reached committed any error, either in finding of fact or conclusion of law, and which appellant may have specified, pointed out, and assigned; and it is required both by statute and rule of this court that the errors complained of shall be particularly pointed out and assigned at the time the appeal is taken.

Sav. & Loan Soc. vs. Davidson, 97 Fed. 696;
P. P. Mast Co. vs. Superior Drill Co., 154
Fed. 45;
Frame vs. Portland Gold Min. Co., 108 Fed.
750.

The proving of the alleged agreement of March 28, 1870, referred to in the second assignment of error, was the primary and fundamental issue in the case. If plaintiff could not sustain that, it could not, for that reason, sustain any other issue. To allege gen-

erally that the court erred in deciding that issue in favor of defendant, without specifying in what aspect of the case, or upon what phase or portion of the evidence, or theory of the law, the error exists, amounts to no more than, but is equivalent to, saying that the court erred in deciding the whole cause in favor of defendant, and is an attempt to impose an excess of duty upon, and is demanding an excess of function of this court, by asking it to search and examine the whole massive record as though the case were brought here for trial *de novo*, and to discover for itself, if it can, from such search and examination, in what respect the trial court erred in not deciding the issue in favor of the plaintiff.

Garrett vs. Pope Motor Car Co., 168 Fed. 905;

U. S. vs. Stone & Downer, 175 Fed. 33.

In *Craig vs. Dorr*, 145 Fed. 307, the Court say:

"It (the assignment of error) does not 'set out separately and particularly each error asserted and intended to be urged.' It leaves the field open for what was done. Counsel under this exception go into an extended discussion of facts, which involves an examination of the entire record in the cause from the issuing of the original subpoena to the entering of the final decree, and finding the facts, including passing on the credibility of witnesses. This the court will not undertake to do."

And it is manifestly unfair to appellee to require

her, without there having been "set out separately and particularly each error asserted and intended to be urged," to anticipate and appreciate what questions upon the record the appellant's counsel will urge in argument as a basis for their claim that the learned judge who tried the cause below erred in not deciding the issue as to the alleged lost document in favor of the plaintiff.

In *P. P. Mast Co. vs. Superior Drill Co.*, 154 Fed. 45, 50, the Court say:

"This rule (11) was prescribed as well for the benefit of the adverse party in preparing his case for hearing as for the convenience of the court in its examination of the record and disposition of the questions presented."

The remaining assignments numbered 3 to 8 inclusive are each and all subject to the same objection as to generality, indefiniteness, uncertainty, and insufficiency, under rule 11. But inasmuch as any and all possible questions which might be raised by these assignments hinge and are dependent upon the issue referred to in the second assignment, we do not believe it to be necessary to point out in detail why they are faulty. If the second assignment is disregarded, as it seems very clear to us that it should be, then there is nothing presented by the remaining assignments which, in any view of their completeness or sufficiency, this court could find it necessary to consider.

APPELLEE'S STATEMENT OF THE CASE.

The nature of the case attempted to be made upon the bill, and the character of proof offered in support of it, makes it impossible to present what may properly be termed a *statement of fact*. There have been no material facts established on behalf of complainant by competent legal evidence. Whatever situation is brought into the view of the court with reference to the equitable claims attempted to be made by the bill arises solely and entirely from the averments of the bill, and from suggestions and inferences sought to be drawn from incompetent and irrelevant matter offered as evidence. For this reason, as well as because of the uncertain and insufficient assignment of errors, and which does not apprise appellee's counsel of what they will probably be confronted with in the way of statement and argument on behalf of appellant, we consider it necessary to present our own statement of the case.

The issue which complainant has sought to raise by its bill is the ownership and the right to the legal title of the E. $\frac{1}{2}$ of S.E. $\frac{1}{4}$, and lots 5 and 6 of section 29, and the N. $\frac{1}{2}$ of N.E. $\frac{1}{4}$ of section 32, all in township one south, of range two east, Willamette meridian, Clackamas County, Oregon.

The defendant (appellee) has the legal title of record.

The lands were deeded to "Ben Holladay & Co."—the former tract May 4, 1869, and the latter tract October 5, 1869; and the legal title has continued to so stand of record up to the present time, except in

so far as it has been affected by the death of Ben Holladay in July, 1887, and the administration and final settlement of his estate pursuant to testamentary disposition thereof.

Ben Holladay left existing at his death a will, in which, after making certain specific bequests and devises, he named the defendant in this suit, who was his granddaughter, his residuary devisee. (See will, Complainant's Ex. 43, Rec. p. 1366.)

After he had made his last will Ben Holladay had born to him two children—a girl named Linda and a boy named Ben Campbell Holladay—who were aged respectively ten and eight years at the time of their father's death. They were not mentioned in the will, and under the law of Oregon take by inheritance, (Lord's Or. Laws, sec. 7325). These two children are living in the State of California, and although not joined as defendants in this suit, are tenants in common with defendant in whatever estate or interest in the property described Ben Holladay was seized or possessed of at the time of his death. The defendant at the time of Ben Holladay's death was sixteen years old. She has since that time resided out of the United States. (Rec. p. 104.)

The estate of Ben Holladay, deceased, was fully and finally administered upon, and the administrator was discharged, September 10, 1900. (Ex. 43, Rec. p. 1371-2.) The land was not sequestered or appropriated for the purposes of administration, and pursuant to statute of Oregon the title passed to the heirs

and devisees upon the discharge of the administrator. Lord's Oregon Laws, Sec. 1304, provides:

"The real property of the deceased is the property of those to whom it descends by law or is devised by will, subject to the possession of the executor or administrator, and to be applied to the satisfaction of claims against the estate, as by this title provided; but upon the settlement of the estate, and the termination of the administration thereof, so much of said real property as remains unsold or unappropriated is discharged from such possession and liability without any order or decree therefor."

It was not the subject of any specific devise, nor charged with the payment of any legacy or bequest, and, by the provision of the will, fell into the residuary devise to defendant, subject to the rights of the heirs mentioned.

Some time prior to November 19, 1868, the two tracts of land above described, being then a part of the public domain, were applied for under form of cash entry, the tract in section 29 by James Grindley, and the tract in section 32 by William Showers; and pursuant to the applications so made patents issued, to Grindley August 5, 1869, and to Gardner Elliott, as assignee of Showers, May 2, 1870. (Complainant's Ex. 43; Rec. p. 1363.)

On *November 19, 1868*, both Grindley and Showers, for a valuable consideration, executed and deliv-

ered to Ben Holladay & Co. bills of sale of all of the fir timber upon both tracts, granting also the right to erect and maintain a mill upon the land for the cutting and removal of the timber. Complainant's Exhibits 39 and 40; Rec. p. 1353-5.)

Ben Holladay & Co. was a co-partnership composed of Ben Holladay (24-40), C. Temple Emmet 10-40), and S. G. Elliott (6-40). (Bill, Rec. p. 4-5.)

In the month of September, 1868, Ben Holladay & Co. took over by assignment from A. J. Cook & Co. a contract between the latter and the "Oregon Central Railroad Company," for the constructing and equipping of 150 miles of railroad. In January, 1869, pursuant to the purchase of the timber on the lands by bills of saile from Grindley and Showers on November 19, 1868, Ben Holladay & Co. installed a small saw-mill, known as "Mill No. 3," on the southeasterly portion of the tract in section 32 (Rec. p. 178), and proceeded to log and mill the timber upon both tracts and use it in the construction of the "first twenty miles" of the "Oregon Central Railroad." (Rec. p. 179, 191.) The work of constructing the railroad had been previously commenced on April 16, 1868, and the "first twenty miles" was completed *December 24, 1869*. (Rec. p. 99, 676, 114.)

Upon the completion of the "first twenty miles" of the railroad, "Ben Holladay & Co. practically ceased to do business as such firm." (Rec. p. 883.) Prior thereto and on November 5, 1869, Ben Holladay and C. Temple Emmet had begun a suit against S. G.

Elliott for the purpose of winding up the co-partnership, and which thereafter proceeded to a final decree of settlement and dissolution. (Ex. 23; Rec. p. 1172.)

In the course of constructing the "first twenty miles" of the railroad, *all of the timber from the land in question was used.* (Rec. p. 677-8.) From the commencement of logging and milling operations on the land in January, 1869, and the hauling of the sawed materials to the railroad, such operations proceeded on an extensive scale. There were employed about the work "As many as seventy-five men counting the log cutters, teamsters, and everything, and there was a good many teams hauling this bridge material and ties and railroad material to the track for construction purposes." (Rec. p. 191.)

Complainant's exhibit 3 was introduced as the payroll account of this mill No. 3, and this shows that the logging and milling operations were begun early in January, 1869, and continued until the month of June, 1869 (Rec. p. 194-5); and the fact is thereby necessarily established that the timber must have been pretty well cut and removed from the land by Ben Holladay & Co. pursuant to the bills of sale from Grindley and Showers at the time shown by the last pay-roll item — June, 1869. There is evidence, however, that logging operations were continued after that time, and later in the fall of 1869. (Rec. p. 89.)

But the fact is practically admitted by the bill, and the evidence touching it is full and uncontra-

dicted, that all of the timber upon the land had been cut and removed from it at the time of the completion of the "first twenty miles" of railroad—December 24, 1869. (Rec. p. 179, 204, 676.) ,

After Ben Holladay & Co. had purchased the timber by the bills of sale referred to, and after they had proceeded as shown in their operations of cutting and removing the timber from January, 1869, the *land* was deeded to "Ben Holladay & Co." — the Grindley tract in section 29 *May 4, 1869*; and the Elliott tract in section 32 *October 5, 1869*. Neither tract had been patented at the time it was so deeded. (Complainant's Ex. 41, 42 and 43; Rec. p. 1358 *et seq.*)

The land has never been cleared or cultivated, but has remained to the present time in its natural state as left by Ben Holladay & Co. at the time they finished logging and had denuded it of the timber in 1869. It has never been in the actual possession or occupancy of any person since that time.

In March, 1905, the land was inclosed by a fence constructed by complainant (appellant), or by its direction, for the purpose of initiating a title by adverse possession in another corporation—the Oregon & California *Land* Company—which complainant attempted to place in possession, but without any attempt to transfer or convey to said *Land* Company any right, interest or title claimed by complainant. There was simply an abandonment to the Land Company of whatever possession complainant assumed

to acquire by the fencing of the land. (Rec. p. 816, 836, 842, 845, 768-9, 776.)

Upon the situation so existing defendant, who holds the legal title of record as tenant in common with the two heirs above mentioned, commenced, on March 13, 1911, an action in ejectment in the United States Circuit Court for the District of Oregon against the Oregon & California Railroad Company, (the complainant herein), which, as defendant was then informed and understood, was claiming possession by reason of the fence. For the purpose of enjoining the prosecution of the action in ejectment complainant has brought the present suit.

It is alleged in the bill in substance that Ben Holladay & Co. purchased these two tracts of land *at the times shown by the dates in the deeds from Grindley and Elliott*, (Com. Ex. 41, 42; Rec. 1358), for the purpose of securing the timber upon them and to acquire a site for a saw-mill to manufacture the timber into ties and bridge timbers to be used in the construction of the "first twenty miles" of the railroad of the "Oregon Central Railroad Company," and "in the performance of said contracts upon the part of Ben Holladay & Co. with the said Oregon Central Railroad Company for the construction of said railroad." (Rec. p. 5.)

This allegation, and the proposition that the land was purchased, as alleged, for the purpose of securing the timber from it, or that it was partnership property of the firm of Ben Holladay & Co., is con-

troverted by the defendant. The only evidence there is in the record addressed to or bearing upon the matter so alleged in the bill is the bills of sale of the timber (Exhibits 39 and 40), and the deeds from Grindley and Elliott (Exhibits 41 and 42), and what we have called attention to above as showing the commencement and extent of logging operations upon the land pursuant to the bills of sale of the timber before the land was deeded, and that all of the timber had been cut and removed from the land at the time the "first twenty miles" of the railroad was completed—December 24, 1869.

It appears that after the completion of the first twenty miles of the railroad the mill was removed from the land and set up and used elsewhere. (Rec. p. 179, 678.)

It is not alleged in the bill, and it is not shown by the record, that the firm of Ben Holladay & Co. ever undertook to engage in any other business than the construction of 150 miles of railroad for the "Oregon Central Railroad Company"; and it appears that the only business the firm ever actually did engage in was the construction of said first twenty miles of railroad; and that Ben Holladay & Co. then practically ceased to do business as such firm. (Rec. p. 883.) As above stated, a dissolution suit had been begun on November 5, 1868, previously. Other than what is so alleged in the bill the record discloses no attempt to show any purpose which the firm of Ben Holladay & Co. had, or might have had, in purchas-

ing the land, or any use which they could possibly have had for it in the conduct of the partnership business. There is no attempt made to show that it was ever applied to partnership uses, or that it was paid for out of partnership funds, or that it was carried as a partnership asset in the firm accounts.

In the suit of *Holladay vs. Elliott*, above referred to, the pleadings and files in which complainant has sought to introduce in evidence in this suit, the following testimony was given by Ben Holladay April 3, 1871. (Rec. p. 883) ;

“Int. 22—State fully all the property owned by the firm of Ben Holladay & Co. at the date of the commencement of this suit, and its value?

“Ans.— * * * Aside from these contracts the firm of Ben Holladay & Company had nothing except two saw-mills and a small machine shop; also some personal property, consisting of shovels, picks, cattle, etc., the exact value of which I do not know.

“Int. 23—State when the firm of Ben Holladay & Co. practically ceased to do business as such firm?

“Ans.—The latter part of December, 1869, when the first twenty miles of road were completed.”

Other than what has been shown above, the record is absolutely barren of any evidence bearing upon the question as to whether the land was the partnership

property of Ben Holladay & Co. at the time complainant alleges its equitable claims had their origin—March 28, 1870.

It is alleged in the bill, (Rec. p. 7):

“That on the 28th day of March, 1870, the said Ben Holladay & Co. then and there had a settlement with the Oregon Central Railroad Company of and concerning the performance of said contracts and all matters and things in relation thereto, and then and there the said Ben Holladay & Co. and said Oregon Central Railroad Company made and entered into an agreement in words and figures,” etc.

The alleged “agreement” is pleaded *in haec verba* in the bill, (Rec. p. 7), but for convenience we append a copy at the end of this brief.

The bill also alleges that the “agreement” so pleaded “has been lost, mislaid, or destroyed, and your orator avers, upon information and belief, that the same was destroyed in the fire and great conflagration in San Francisco, California, on April 18, 1906”; and “that the only record thereof, so far as known to your orator, is the copy of the same in the minute book of the Oregon Central Railroad Company, now in the possession of your orator.”

The execution and delivery of the alleged lost document is put in issue by the defendant’s answer.

No witness has testified to having ever seen or known of the existence of the alleged document. No

witness has testified to ever having seen the alleged purported copy of it in the minute book of the Oregon Central Railroad Company, (Com. Ex. 7), or of having known or heard that there was what purported to be a copy thereof in such minute book, prior to the commencement of this litigation.

The corporation, the Oregon Central Railroad Company, whose corporate affairs the minute book purports to record, went into voluntary dissolution March 28, 1870, the date on which the document is alleged to have been executed, and the last corporate act or transaction recorded in the book is of that date. The book at that time became obsolete. There is no evidence that any one ever looked between its covers from the date of the last entry until this litigation was commenced.

Mr. R. Koehler, who has been connected with the complainant company as an officer since July, 1874, and who has been in familiar and intimate touch with its corporate affairs and records during that time, testified as follows:

Q. Did you ever see this minute book and was it under your general supervision during the time you were connected with this company?

A. Well, it was in the secretary's control in the vault in which were kept the documents and books of the company.

Q. State whether this book and the book which purports to have been kept by the officers of the Ore-

gon Central Railroad Company, was in the custody of the secretary at the time you first came to this property?

A. Yes,—and this book, which I understand to be the minutes of the Oregon Central Railroad Company was in the custody of the secretary of the Oregon & California Railroad Company.

Q. Did you as an officer of the Oregon & California Railroad Company act upon it as such official record of the Oregon Central Railroad Company?

A. Yes.

* * * * *

Q. I call your attention particularly to the instrument set out at page 175 of these minutes, and page 176 purporting to be a copy of an agreement signed by Ben Holladay, and by C. Temple Emmet by Ben Holladay, attorney in fact, and by Ben Holladay and Company by Ben Holladay and will ask you if you ever saw the original of which that purports to be a copy, and if not, what has become of the original, if you know?

A. I do not recollect to have seen the original of that. (Rec. p. 688-690.)

It is not shown that any where among the records of the complainant or of the Oregon Central R. R. Co. is there found any trace of the alleged "agreement" having ever been in the possession of the company.

Complainant's exhibit 8 is a record book labeled

"O. & C. R. R. Co., Secretary, Records Deeds, contracts, agreements, etc." This book was started to be kept in 1883 or 1884. "The purpose was to have a complete index to all the important papers belonging to the company." (Rec. p. 702.) The alleged lost instrument was not listed or made a matter of record in that book. Numerous other records were introduced by complainant's counsel containing lists of documents of like character with those in Exhibit 8, but nowhere is there any record of or reference to the alleged lost "agreement." (See Complainant's exhibits 9, 15, and 16; Rec. p. 473, 604, 611.)

It follows as a necessary sequel of the foregoing that no claim was ever made by complainant to the ownership of this land based upon the alleged lost instrument prior to the commencement of this litigation. There is an entire absence of evidence in the record of any claim of ownership, or of any act or incident of possession of the land on the part of complainant or the Oregon Central Railroad Company at any time, or in any manner, connected with the alleged lost "agreement," or with any knowledge, or information, or belief on the part of any officer or employe of complainant that it had any right in or made any claim to the land by reason of the alleged document ever having existed, or reason of there having been a purported copy of it in said minute book.

There has been no attempt by complainant to support with proof the allegation of its bill that on the

purported date of the alleged lost "agreement," (March 28, 1870), the Oregon Central Railroad Company "then and there entered into the possession of the real premises hereinbefore described." (Rec. p. 9.) There has been offered no evidence of any kind to show any act or incident of possession done upon or with reference to the land by either the Oregon Central Railroad Company or the complainant during the life time of Ben Holladay (from the date of the alleged "agreement," March 28, 1870, to July 8, 1887, the date of Ben Holladay's decease—seventeen years), nor for several years following his death. There is not a single circumstance shown to indicate that Ben Holladay during his lifetime ever had any knowledge or in any way recognized, that the complainant, or the Oregon Central Company, made any claim to the land or to any right to its possession.

The only evidence offered to show any acts done, or attempted to be done, in any way related to the possession of the land at any time prior to its inclosure by a fence in March, 1905, was an examination made of it by an employe of complainant's land department (N. E. Britt) in 1889 or 1890. The examination was made for the purpose of ascertaining and appraising its selling value. There were a few other sporadic and incidental visits to and views of the land made by the same employe thereafter,—ten or twelve in as many years. After the first examination he made casual visits, perhaps once a year, and some of the visits were merely incidental to other business he had in the vicinity of the land. (Rec. p. 160, 165.)

The Oregon & California Railroad Company, the complainant, was the beneficiary of a large grant of land from the United States, with primary limits twenty miles distant on either side of its railroad and coterminous therewith from Portland to the California line, and indemnity limits ten miles distant from and beyond the exterior limits of the primary grant, and comprising some three million acres. (Complainant's Ex. 30; Rec. p. 743.) The witness Britt was employed as "land examiner and appraiser of the land grant." "For a good many years I had charge of the field work of the land,—that is, I was expected to look for trespassers and such as that." He did a good deal of cruising of lands in the grant, and in a good many cases examined lands all over the grant and appraised them for the purpose of sale.

Q. So that your duties were not confined to any particular land in the land grant, but extended generally to all parts of it,—So that this land was not any more in your care and under your control than any of the other lands belonging to the railroad company?

A. No sir. (Rec. p. 165.)

It appears that the complainant had a survey made of the land by the county surveyor of Clackamas County in 1884; and after the survey was made, and in the same year, complainant's land agent, accompanied by David Loring, a witness for complainant in this case and who was then employed as a clerk by the land agent, visited and looked over the land and

examined the survey made by the county surveyor. (Rec. p. 128.)

It also appears that complainant made a contract with one E. F. Hall in 1894 or 1895, assuming to give to the latter the right to cut and take some cord wood from the land; that the wood was cut on the northerly part of the land (the Grindley tract) and was purchased from Hall by A. N. Wills. (Rec. p. 148, 205.)

And Mr. Koehler testified, (Rec. p. 709): "I was once on the premises. I have only a dim recollection of that; I think it was between 1890 and 1900. I think we were looking for wood, and the question was whether we could cut some wood upon the premises for locomotive purposes. I was on the premises, but only on a very small part of it." It does not appear that Mr. Koehler obtained any wood.

It appears also that some time about 1900 complainant demanded and received from Clackamas County a sum of money for some gravel which the county had taken from the land. (Rec. p. 710.)

The foregoing comprehends the full measure and the entire scope of complainant's proof of possession, or of acts or incidents on its behalf related to possession, previous to the construction of a fence around the premises in March, 1905.

Prior to the fencing in 1905 the land had never been inclosed, but was open common and was used for pasturage for cattle by the people who lived adjoining and adjacent to it. It was average pasture land.

No one has ever lived upon it. It is suitable for residence in its present condition, and has been since it was logged in 1869. It is about eight miles from the City of Portland. If cleared it would be suitable for agricultural purposes. All of the land around and adjacent is and for many years has been cleared and cultivated. Witnesses who have lived across the road from the land since 1882 and have seen it practically every day since and have been upon and over it many times, never knew of any one objecting, or claiming the right to object to the use of the land by the public for pasturage, and they never knew of any warning given by complainant or any one else against such use of it; andt hey never knew of "any acts performed by any person or persons upon or with reference to this land prior to 1905 indicating any claim to or ownership of the land." (Rec. p. 937. *et seq.*; Britt, p. 170-3.)

The land is situated from three-quarters of a mile to a mile and a half from complainant's railroad. (Com. Ex. 1.) It was never used for any purpose by either the Oregon Central Company or complainant. It has formed no part of complainant's operating property, and has never been considered as having any prospective use as such. (Rec.—Koehler, p. 722; O'Brien, p. 680.)

When in 1889 or 1890—several years after Ben Holladay's death—complainant's land agent conceived the idea of attempting to claim it (without, so far as appears, basing such attempt upon any known

color of title or claim of right), and he sent the witness Britt to examine and appraise it, the purpose was "to ascertain the selling value of the land." (Rec. p. 170.)

It does not clearly appear by whom the fence was built in 1905—whether by the complainant, or by the Oregon & California Land Company—; but it appears that it was built *for the land company*. (Rec. p. 815-818.)

The Oregon & California Land Company was a corporation organized October 14, 1904. Its incorporators and officers were officers and employes of the "Harriman Lines in Oregon." (Rec. p. 836, *et seq.*)

It is not shown in the record by whom the stock was or is owned or held. The purpose of its organization was to make it a holding company of the titles to certain lands which the Oregon & California Railroad Company, complainant, was, or claimed to be, the equitable owner of, but the legal titles to which stood in the names of certain individuals in trust for the railroad company.

C. W. Eberlein, who was the acting land agent of complainant company and had full charge of its land affairs at the time the fence was built, and by whose direction the fence was built, and at whose instance also the land company was organized, (Rec. p. 836), testified as follows:

Q. (By Mr. Fenton): You afterwards, as part of your duties, took deeds from these men to the Ore-

gon & California Railroad Company to such lands as the general manager thought would be used for operating purposes, *and to such lands as were not operating lands you took title in the Oregon & California Land Company.*

A. Those lands were gathered up—such as were not needed for operation so that they might be disposed of and not be subject to the lien of the Union Trust Company.

Q. Of July 1, 1887? A. Yes.

* * * * *

Q. Now, these miscellaneous lands that were supposed to be lands not particularly needed at the time for operating purposes which you say were taken over to the Oregon & California *Land Company*, and were to be sold.

A. It was to get them into position so that they could be sold.

Q. Now, as a matter of fact, Mr. Eberlein, *these particular lands were never deeded to the Oregon & California Land Company.*

A. No.

Q. *But they were carried in the Oregon Land Company's department?*

A. Yes.

Q. Did you understand how that happened to be done?

A. I can only say from my recollection of the general policy—these miscellaneous lands did not come by any act of Congress—they were gathered up as I understood by gift or possibly by purchase, and for reasons which I never knew and never cared to take the trouble to look into, they were held in trust by a number of different persons, and some of them very old, and the idea was to get this land that belonged to the railroad company into an owner controlled by the railroad company, so it could be sold.

* * * The lands were all gathered up and put together and any lands that were needed (Mr. Calvin or Mr. O'Brien passed on that question) and if there were any lands needed for use in operating the railroad, they were deeded to the Oregon & California Railroad Company. I believe there were only certain lands which were deeded to the Oregon & California Railroad Company, and the rest of the lands were turned into the Land Company, to gather them together and put them in business like shape."

Q. You do not know how it came about that the Oregon & California Land Company did not get title from the Oregon & California Land Company or anybody to these lands in suit?

A. No, I have no idea why they did not—I never heard. They were included in the list of miscellaneous lands and the fact that the record title was not in any of these different trustees was something entirely unforeseen and was something I did not know until it was brought to my attention." (Rec. 683-684.)

And on re-direct examination the same witness testified, (Rec. p. 845 *et seq.*):

Q. Is it, or is it not a fact that the fence was put around this land at that time for the sole purpose of taking possession and claiming possession—adverse possession—in order to start the statute of limitations running and obtain title to the land in that way?

A. I believe—that was my understanding at the time that inasmuch as there was no record title, that it would be inadvisable to stir the matter up, and that we could fence it, and assert our possession that way, and I presume to take advantage of the statute of limitations in that case.

The same witness testifies, (Rec. p. 818):

Q. Who assumed to take possession of the land by the fencing of the land,—the *land* company or the *railroad* company?

A. I do not remember whether the land company was organized at that time, but if not, it must have been organized very shortly afterwards.

Q. The testimony is that the land company was organized in 1904, and this fence was built in 1905?

A. It is very likely that the title (possession) must have been held by the Oregon & California Land Company.”

The land has been assessed to Ben Holladay & Co. since and including 1902. The taxes assessed against

it after it was fenced in March, 1905, are shown to have been paid as follows:

For the year 1905, by Mr. Miller, for the S. P. Co.

For 1906, paid by the S. P. Co.

For 1907 and subsequent years, by the Oregon & California Land Co. (Com. Ex 62, 63, 64, 65, 66, 67; Rec. p. 767, 1084.)

Complainant's witness, B. A. McAllister, who is and since September, 1908, has been its land commissioner, testified, (Rec. p. 766 *et seq.*):

Q. What relation does the Oregon & California Land Company sustain to the Oregon & California Railroad Company?

A. It was a corporation organized, as I have stated, for the purpose of taking over the title to these miscellaneous lands and hold them for the benefit of the Oregon & California Railroad Company.

Q. If it should turn out that the tax receipts for the years 1906, 1907, 1908, 1909, 1910 should show that the taxes were paid by the Oregon & California Land Company, how can you explain that?

A. Well, that would be immaterial, because whatever the Oregon & California Land Company owns or holds title to is practically the property of the Oregon & California Railroad Company.

Q. Who has charge of the acts of the Oregon & California Land Company as to all these lands, and the payment by that company. A. I do.

Q. Is that in your department in connection with the Oregon & California Railroad land department?

A. Yes, sir.

* * * * *

Q. Do you know what the fact is as to why these lands were not conveyed direct to the Oregon & California Railroad Company?

A. They were lands which is was proposed to offer for sale, and it was more convenient to handle and sell them through this auxiliary company.

Q. Why was it more convenient with relation to the mortgage of July the 1st, 1887, to the Union Trust Company, if you know?

A. *Well, because if conveyed to the railroad company they would become subject to that mortgage, and would cause trouble and inconvenience in getting releases from that mortgage in case of sale.*

* * * * *

Q. Those lands were sold—some of them, were they not, by the Oregon & California Land Company?

A. Some of them have been sold, yes.

Q. Have the proceeds of those lands, at any time, been applied in any way to the payment of the mortgage held by the Union Trust Company, as trustee, upon the property and assets of the Oregon & California Railroad Company?

A. Not directly, so far as I know.

Q. Has the Oregon & California Land Company claimed to own this land in suit here since its organization?

A. Well, the question of ownership as between the two companies as far as I know has not come up.

Q. I ask you for a direct answer, Mr. McAllister—I asked you whether or not the Oregon & California Land Company has claimed to own this land that is involved in this suit since the organization of the Oregon & California Land Company?

A. Well, the ownership of the land has been claimed to be in the Oregon & California Railroad Company. *The question as to where the title should be placed is one to be adjusted hereafter so far as that goes.* (Rec. p. 776.)

If the railroad company had taken possession when the land was fenced and had thereafter succeeded in effecting a title by adverse possession, of course such title would have become subject to the lien of the mortgage held by the Union Trust Company, and would have enured to the benefit of the bondholders. It was in order to obviate that result that the railroad company abandoned the possession to the land company, and so that the latter could acquire a title by adverse possession against both the defendant and the railroad company; and this is, of course, in effect an implied or incidental admission of the highest character on the part of complainant that it did not, when the land company went into possession, claim title to the land, either legally or equitably.

Complainant's evidence shows that an application was made in writing to the *land* company April 20, 1908, by F. I. Hickey, to lease the land, and which was approved and accepted in writing by the *land company*. (Rec. p. 1343; Com. Ex. 32). This was, of course, in view of the foregoing evidence, with the knowledge and consent of the complainant railroad company. The leasing of the land by the *land company* is the last act of possession shown on the part of either the *railroad company* or the *land company*; and under the statutory presumption "That a thing once proved to exist continues as long as is usual with things of that nature," (Lord's Oregon Laws, sec. 799, sub-div. 30), the fact is established that the land company has been in whatever possession of the land could be claimed by either the land company or the complainant since April 20th, 1908, and was in such possession at the time complainant commenced this suit; and that the complainant has not, at least since said date, been, and is not now in possession of the land.

Although the land was patented, the Grindley tract August 5, 1869 and the Elliott tract May 2, 1870, and had been deeded to "Ben Holladay & Co." prior thereto, and the deeds recorded, it was not assessed for taxes until for the year 1873. The instrument which complainant pleads and makes the basis of its asserted claim of equitable ownership purports to have been dated March 28, 1870. No one therefore paid any taxes until 1874. The title then stood of record in Ben Holladay, and the land should have been so assessed. It was not so assessed, however, but by a

manifest error which there has been no attempt to explain, it was assessed with other land to the Oregon & California Railroad Company, and continued to be so assessed down to and including the year 1877. It was not assessed to any one for the year 1878.

In 1879 it was again assessed with other land to the railroad company.

In 1880 among the lands assessed to the Oregon & California Railroad Company appears this description on the rolls: "29 and 32—1S—2E—160 acres," followed by a recital "in name Ben Holladay."

From 1881 down to and including the year 1901 it was assessed with other lands to the railroad company.

Since and including 1902 it has been assessed to Ben Holladay & Company. (Rec. p. 1084.)

Complainant's counsel first offered in evidence a statement certified to by the county clerk of Clackamas County, purporting to show to whom the lands had been assessed and by whom the taxes were paid from 1873 to 1910, but upon objection by defendant that such a statement was incompetent (Rec. p. 215; Ex. 6; Rec. p. 1084), the counsel for complainant made an omnibus offer of all "the original rolls for the year 1869 to 1910, both inclusive, and asks leave to withdraw the same and substitute a certified statement in lieu of the original, so far as it relates to the land heretofore described."

It was agreed and admitted that the land has been

assessed as shown by the statement, Complainant's Exhibit 6 (Rec. p. 778), and as above stated; but the objection to the statement as showing by whom the taxes were paid was preserved (Rec. p. 777).

The assessment rolls so offered by complainant are not identified as an exhibit, or exhibits, nor is there any particular part or portion of the rolls specified or indicated as having been offered.

Complainant's counsel then procured the witness W. L. Mulvey, county clerk of Clackamas County, to read into the record such portions of the tax records and to make such computations and state such deductions as the record discloses, without offering in evidence the original records, other than as above. (Rec. p. 779 *et seq.*)

At the close of Mr. Mulvey's testimony counsel stated "that he desires to have it appear on the record that these original records were produced by the county clerk of Clackamas County, and that they are here now for the inspection of counsel, and are offered in evidence with the understanding that they may be withdrawn and left with the county clerk of Clackamas County."

The method of proving such records, or matter appearing thereon, is prescribed by statute—Section 3733, Lord's Oregon Laws—as follows:

"The entries made in the assessment and tax rolls, the warrants and certificates thereto attached, in the county clerks', county treasurers', and

tax collectors' books, receipt and certificate stubs, and duplicates recorded by the county clerk, county treasurer or tax collector, or his deputy, shall be *prima facie* evidence in all judicial proceedings."

In the year 1903 complainant's land agent made an investigation of the tax records and the payment of taxes upon lands by the company, covering a period of fifteen years prior thereto. The investigation "covered everything which the company was supposed to own." (Rec. p. 808.)

C. W. Eberlin, who as land agent caused the investigation to be made, testified as follows, (Rec. p. 809):

Q. Did you in that investigation find that the company been paying taxes upon land that it did not own or claim to own?

A. Yes, sir.

Q. Will you kindly state, as fully as you can, what were the facts about the company taxes upon land which the company did not own or claim to own?

A. Yes, we found that we had been paying taxes on considerable land that we did not own.

Q. Well, how with reference to time—was that of long duration?

A. Yes, it covered considerable time, and took in a good many tracts.

Q. What I am getting at is this, I do not want

to ask leading questions, but I would like to know if in this investigation it was brought to your knowledge personally as a land officer of the company that the railroad company had been paying taxes upon land for many years—many tracts of land—which the company did not own, and which it had no title to, and which it afterwards abandoned any claim to own?

A. As near as I can understand the examination disclosed considerable land that the company did not own at the time, and to the discovery that we had been paying taxes on this land for a considerable time. As to the time I can only state generally that my recollection is that it would extend over a considerable period of time.

Q. That is for a number of years?

A. A number of years in some instances.

If the evidence were competent and sufficient to show that complainant did pay taxes upon the land, there is no evidence in the record to show that it did so upon any claim of ownership at all; and particularly not under any claim of ownership or right based upon the alleged lost instrument; or upon any knowledge, information, or belief possessed by any officer or employe of complainant that such an instrument ever existed or had ever been in the possession of complainant, or that there was a purported copy of it in the minute book of the Oregon Central Railroad Company.

Complainant's witness David Loring was employed

as chief clerk in the office of George H. Andrews, who was the secretary and land agent of the complainant, from 1884 to 1904—twenty years. The secretary was the custodian of the minute book of the Oregon Central Railroad Company during all those years, and would have been the custodian of the alleged document if it had ever existed during that time. Mr. Loring “had charge of making out all the tax rolls and had charge of making contracts” etc., and otherwise had charge of paying taxes on complainant’s lands. He nowhere states that he ever saw or heard of the alleged copy in the minute book, or that complainant ever claimed any right or title to the land based upon it, or that the taxes were paid upon any knowledge of or reliance upon it. (Rec. p. 125.)

Complainant alleges in its bill that the Oregon Central Railroad Company on March 29, 1870—the day after the date of the alleged lost agreement—transferred and conveyed all of its property, rights and franchises to the complainant company, and has offered in evidence a deed from the former to the latter company (Complainant’s Ex. 26; Rec. p. —) in proof of the allegation. This deed appears to have been carefully and properly drawn and executed with all the formalities required by statute, and has affixed to it and cancelled \$800.00 in revenue stamps.

ARGUMENT.

PART I.

The alleged lost instrument as pleaded in the bill

does not describe any real property, or refer to any real property in its granting clause, and it does not purport to have been executed as a deed, or instrument intended to convey the title to real property. There was omitted from its execution every essential formality prescribed by the law in force in the state of Oregon to make it operative as a deed, even between the parties. It is without a seal, without witnesses, without acknowledgement, and without the necessary internal revenue stamps required to be placed upon a conveyance of real property by the Internal Revenue laws of the United States in force at the time it purports to have been made. (Section 151 and Schedule B, Act of Cong. June 30, 1864; 13 Stat. 291, 299; section 163 Act of Cong. June 30, 1864, as amended by section 9, Act of July 13, 1866; 14 Stat. 143.) But it purports to have had affixed to it and cancelled a five-cent revenue stamp, as required by said acts to be affixed to a simple contract or bill of sale of personal property.

Other matters are pleaded as evidence, and attempted to be proved, in the light of which it is contended that the alleged lost instrument, notwithstanding its apparent disabilities as a conveyance of real property, was nevertheless intended to operate as a conveyance of, or as a contract to convey the real property in question. The complainant's suit, however, is bottomed squarely upon the alleged lost document; and whatever equities it can show itself to possess must be symbolized by it. Whatever probative force might be ascribed to the other matters of

evidence pleaded in the bill—if they were established by competent evidence—as having a tendency to render more or less probable the former existence, execution, loss and contents of the alleged lost document, or as tending to support complainant's contention that the document if established would be capable, in the light of those matters, of being construed as a deed of, or a contract to convey, this property, is, of course, a subject for consideration in another connection. But it is certain that if complainant can be awarded the ownership and legal title of the land in this suit it must be by virtue of the alleged lost instrument, established by competent evidence, and construed as a conveyance of the land, or as the foundation of an equity which created an obligation on the part of Ben Holladay to make a conveyance. In other words, if the alleged lost agreement were eliminated from the bill there would be nothing else left in it which it could be in any way claimed was connected either directly or indirectly, proximately or remotely, with the ownership, legal or equitable, of the land involved; and the document itself is so connected only because complainant has alleged in its bill that it is, for there is no competent evidence to prove that it ever existed.

Complainant's counsel have introduced a great amount of documentary matter which, added to the lengthy testimony of complainant's witnesses, has made the record a very large one. Obviously one of the purposes of this was to create a suspicion that an equity might lie concealed within the massed evi-

dence, and, in order that such suspicion should be either confirmed or dispelled, to force upon the attention of the court matters and circumstances regardless of their competency or admissibility as legal proof, but from which suggestions and conjecture, however remote—possibilities and surmises—might be drawn and indulged, and that wraiths of equity floating in phantasies of the imagination might be conceived and conjured out of transactions buried with the departed years since 1870, and held to the view of the court by the learned counsel. There has been no pretense that the claimed equitable rights are founded upon any direct acts or dealings of the parties with reference to this particular land, or upon any substantial facts or circumstances which would create an equitable estoppel in complainant's favor. Neither fraud, accident nor mistake is alleged or attempted to be shown; but by an attempt at drawing in of inferences from various ad remote circumstances attending certain alleged other dealings between the parties, neither directly nor indirectly connected with this land, but from which appellant's counsel contend it can be *inferred* that *it might* have been intended that Ben Holladay should have conveyed this property to the Oregon Central Railroad Company, the court is asked to divest the defendant of her legal title of record, and establish complainant's alleged and hitherto unknown and unasserted equitable title.

All of the matters alleged in the bill, and all of the evidence proffered in support thereof and to establish complainant's equitable rights claimed upon

the basis of the alleged lost and unrecorded document,—and now first asserted after more than forty years, and after all of the parties and witnesses are dead,—have been known to and have been in the possession of the complainant since March 28, 1870. The courts have been open to complainant all of that time, and there does not appear to have been any obstacle or impediment to prevent or hinder it from having asserted and sought a determination of its rights during all of those years.

The learned District Judge before whom the cause was tried below decided it in favor of defendant upon two primary and paramount propositions, viz.:

(1) That the alleged lost “agreement” had not been established by competent evidence, hence that complainant had shown no title, either legal or equitable, having that as a basis; and

(2) That complainant had not proved a title acquired by adverse possession.

The only evidence offered to prove the existence, execution, delivery, and contents of the alleged lost “agreement” is the minute book of the Oregon Central Railroad Company (Com. Ex. 7), and the pleadings and files in the suit of *Nightengale, et al.*, vs. *the Oregon & California Railroad Company and the Oregon Central Railroad Company*, (hereafter referred to as the *Nightengale case*), commenced in the United States Circuit Court for the District of Oregon, in November, 1869.

No human testimony was offered to show that any eye ever beheld, or that any hand ever touched, the alleged lost agreement; and the sole question is, therefore, whether the minute book and the pleadings and files in the Nightengale case—to which neither Ben Holladay & Co. nor Ben Holladay were parties—are competent evidence to prove and establish the alleged document.

“Unquestionably, lost records may be proved by secondary evidence, *but their former existence and loss must first be established by competent proof*, and it is clear that evidence merely showing that they do not exist is not sufficient to establish either of those requirements.” (Our italics.)

Improvement & R. R. Co. vs. Munson, 14 Wall. 442.

“Assuming it to be competent to establish a title without record evidence, still the burden is on the claimant to prove that the grant was issued, and he cannot give parol evidence of its contents without first proving its existence and loss.”

U. S. vs. Knight, 1 Black 227; 17 L. ed. 76.

“That courts of equity have jurisdiction to set up lost deeds or wills, and establish titles under them, can certainly not be denied; but it is a dangerous jurisdiction, and so pregnant with opportunities of fraud and injustice that it will not

be lightly exercised, nor except upon the clearest and most stringent proof."

Thomas vs. Ribble (Va. 1896), 24 S. E. 242.

"All questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered for their antiquity and the good sense in which they are founded."

Mima Queen vs. Hepburn, 7 Cranch 290.

"The settled rules of evidence which govern the trial of actions measure the extent and secure the protection of the rights of persons and property. Reversals, modifications, or variations of these rules produce instability and uncertainty in these rights, and breed distrust of our courts and government.

Board of Com'rs vs. Keen Five Cent Sav. Bank, 108 Fed. 510.

Courts of equity follow and are governed by the rules of legal evidence.

"It is a fundamental principle that courts of equity follow the common law rules of evidence; and it would be productive of very mischievous consequences if such were not the case."

Bates Fed. Eq. Pro., sec. 388;

Harmer vs. Gwynne, Fed Case No. 6075;
5 McLean 313;

Cochran vs. Blount, 161 U. S. 350;
Buttlar vs. Buttlar, 57 N. J. Eq. 645; 42 Atl.
 755;
Mullany vs. Mullany, 4 N. J. Eq. 20;
Wilcutt vs. Root (Conn.) 338;
Dougherty vs. Randall, 3 Mich. 581;
I Pomeroy's Eq. Jur., sec. 426.

THE MINUTE BOOK—EXHIBIT 7.

The court below held that the minute book of the Oregon Central R. R. Co., and the pleadings and files in the Nightengale case, were not competent evidence to prove the issue as to the former existence, execution, and contents, of the alleged lost "agreement"; and the court was clearly right. Tested by the application of the settled principles of law and rules of evidence which have in all adjudicated cases and without variation, governed the courts in determining similar questions, the documentary evidence referred to is not admissible under any theory to prove that issue, or any phase of it.

The books of a corporation are not competent evidence against a stranger to connect him with the corporation; and they are not admissible against a stockholder or member of the corporation as evidence of his private transactions or dealings with the company, and in respect to them he is to be regarded as a stranger.

Under this well and justly settled rule the minute book is clearly forbidden to be considered as evidence

in complainant's behalf to prove the issue as to the alleged lost document, and we are unable to understand upon what basis of assurance complainant's counsel can contend otherwise.

In *Thompson on Corporations*, (1st ed.) Vol. 6, sec. 7740, that learned commentator has stated the rule and its rationale as follows:

"The general rule is believed to be that, except for the purpose of proving what the corporation did, or what action its corporators took in effecting its organization, its books and records are not evidence as against a stranger, or as against a stockholder holding adversely to it. * * * Where it is sought to use the records of a private corporation, as evidence of the facts that they recite, for the purpose of *concluding*, or even *influencing* the rights of third parties who are strangers to the record, then such records are not admissible, on the same principle which operates to exclude the records of legal judgments when offered for a similar purpose, on the principle that they are *res inter alios acta*,—or in plainer language, upon the principle that the rights of A cannot be concluded or displaced by the fact that C, D, E and F met together in conclave, in the room of a board of directors of a private corporation, and there adopted a certain resolution, or passed a certain vote, or enacted a certain by-law intended to have that effect. The sound rule then is that the records of a private corpora-

tion can not be used in evidence for the purpose of sustaining a claim of the corporation against persons who are not members of it, or to defeat a claim of such a person against the corporation, or to affect strangers in any way. * * * Nor can they be used in evidence in suits by the corporation against its members, for the purpose of proving on behalf of the corporation, entries which are in its interest. If the contrary were the rule, a corporation might manufacture evidence in its own favor, and those who were its guilty agents in so doing would not be subject to the penalties of perjury."

In *Rudd vs. Robinson*, 126 N. Y. 113, the Court say:

"There is no rule of law which charges a stockholder or director of a corporation with actual knowledge of its business transactions merely because he is such director or stockholder. * * * After a careful consideration of all the cases which have come to our attention we can perceive no principle upon which the account books of a corporation can be evidence against a member of the corporation of the accounts and entries therein made in a suit brought by the corporation or its representative against him to enforce his liability upon such account. The officers and bookkeepers of a corporation are in no sense his agents. Individually he has no control over their acts, and has no responsibility therefor; and in

making the entries they do not, in any legal sense, represent or bind him. * * *

It would be quite a dangerous and, we think, startling proposition to hold that a clerk or other officer in a business corporation could enter charges in its books of account against a director or stockholder which could be proved in favor of the corporation by the mere production of the books, thus throwing upon him, or his personal representatives after his death, the burden of explaining the entries or showing them to be untrue, and we believe the doctrine has no support in principle or authority. A corporation seeking to enforce a claim against one of its directors or stockholders must establish it by the application of the same rules of evidence which are applied in an action brought by an individual to enforce a claim against any defendant."

In *Carey vs. Williams*, 79 Fed. 906 the Court say:

"Corporations are not exempt from the ordinary rules of evidence, and there is no stronger presumption of honesty, or regularity or accuracy as to their books or records than there is in the case of natural persons. * * *

"The books and records of corporations, when properly kept, are evidence of the acts and proceedings of the corporate body, but cannot be used to establish claims or rights of the corporation against third persons, unless pursuant to the

sanction of some statute. (Ang. & A. Corp., 679). And they are not evidence against a stockholder in respect to a contract entered into by him with the corporation, notwithstanding he has access to them, because as to such a contract, he is regarded, not as a stockholder, but as a stranger.

* * * In Wharton on Ev. (3rd ed.) sec. 662, it is said that, in suits by a corporation against its members, its books cannot be used as 'proving in behalf of the corporation self serving entries.'"

The foregoing case is cited and approved by the Supreme Court in

Rankin vs. Fidelity, etc. Co., 189 U. S. 252.

In *Hayden vs. Williams*, 96 Fed. 279, the foregoing excerpt from the opinion in *Carey vs. Williams* is quoted and approved, and pursuing the subject the Court say:

"In *Haynes vs. Brown*, 36 N. H. 545, it was held that the books of a corporation were not admissible against a member of the corporation as evidence of his private transactions or dealings with the company, and that in respect to them he is to be regarded as a stranger. There is no real discrepancy between the authorities as to the credit to be given to the books of a corporation. The rules governing their admission have been tersely and correctly stated by complainant's counsel, substantially as follows:

(1) As against a stranger, they are not com-

petent evidence of any facts stated in them; all the entries in them may, like all other entries, be proved to be correct by human testimony.

(2) As between a corporation and its members, and as between the members of a corporation, the books are evidence of what is in them, except the dealings of the corporation with that particular member.

(3) As to his own dealings with a corporation, a member of the corporation is considered a stranger, and, as to those dealings, the entries in the books are not evidence against him."

In *Edwards vs. Bates Co.*, 117 Fed. 537, the Court say:

"On the trial of the case at bar it is developed by the original record book of the county court, introduced in evidence here, that no such order was ever made by the county court of Bates County appointing said Betz agent for such purpose. It appears on page 93 of the minute or record book of the railroad company, that A. L. Betz had been appointed agent of the county at the time of making the order of subscription aforesaid. But that the insertion of said A. L. Betz's name in said purported copy was a fabrication there can be no question. This entry on the record book of the railroad company is clearly incompetent evidence against the defendant. It is not the original evidence of the county court, nor is

it a certified copy therefrom; it only purports to be copied on to the book from a certified copy. As such it is a self serving statement, made up by the railroad company, which, on every rule of law and common justice, is inadmissible against a third party."

The decision last quoted not only announces the rule and clearly illustrates its meaning, but it furnishes a fair example of the evils which its application is designed to prevent. The authorities are very numerous in which the rule has been announced, approved and applied; but the foregoing plainly state and illustrate its meaning, and are, we believe, of sufficient respectability to be considered authoritative. We cite the following, however, for reference if desired:

- Sigua Iron Co. vs. Greene*, 104 Fed. 854;
- Foot vs. Anderson*, 123 Fed. 659;
- Harrison vs. Remington*, 140 Fed. 402;
- Thomas vs. U. S.*, 156 Fed. 913;
- Conn. Mut. L. Ins. Co. vs. Schwent*, 94 U. S. 593;
- Cosaw Min. Co. vs. Carolina*, 75 Fed. 860;
- Trainor vs. Ger. Am. Bldg. Assn.*, 204 Ill. 615;
- Fleming vs. Reed*, 77 N. J. Law. 563; 72 Atl. 299;
- Dolan vs. Wilkerson*, 57 Kan. 758; 48 Pac. 23;
- Jones vs. Florence*, 46 Ala. 626.

There is no evidence that Ben Holladay, or any member of the firm of Ben Holladay & Co., were ever officers or directors of the Oregon Central Railroad Company. It may be conceded that Ben Holladay or Ben Holladay & Co., were stockholders; but that fact, as very clearly explained by the authorities quoted and cited above, does not vary the rule, or limit the scope of its application and effect.

The minute book of the Oregon Central Railroad Company so far as its value as evidence to prove the existence, execution, delivery and contents of the alleged lost instrument is concerned, amounts to the same as, and no more than, any private memorandum or pretended copy of a deed or agreement in the possession of a private individual, and which is neither an official, a certified, an examined, or a proven, or authenticated copy of anything; and as such it is inadmissible under the elementary rule of evidence excluding hearsay.

- *16 Cyc. of Law & Pro.*, p. 1192.

In *Board of Com'rs vs. Keene Five-Cent Sav. Bank*, 108 Fed. 511, the court, by Judge Sanborn, say:

"No rule is more salutary, no principle is more vital to the security of the life, liberty, and property of the citizen, than that rule which prohibits the repetition of the narratives of strangers, whether verbal or written, to determine issues between litigants, and prescribes that only after due notice, and opportunity for cross-exami-

nation of the very parties whose statements are offered, and then only under the solemnity of an oath or affirmation, shall their stories be evidence. Strike down this rule, and the most sacred rights of person and property rest only upon the whimsical and pernicious gossip of the reckless, the irresponsible, and the vicious. The rule that hearsay is incompetent evidence is essential to the preservation of personal liberty and the rights of property. It should be guarded against encroachment with jealous care. Its enforcement is not discretionary with the courts, and its violation is fatal error."

So far as it purports to contain a copy of the alleged lost document, the book is not identified or authenticated in any way. There is no evidence as to when, or from what the alleged copy was written. There is some evidence that the writing was by the hand of one A. J. Moses, who is now dead (Moreland, Rec. p. 892; Dolph, Rec. p. 917) and that A. J. Moses "was a clerk in the office of Mithell and Dolph, and afterwards of Dolph, Bronough, Dolph & Simon." It no where appears that he was an officer or employe of the corporation. The book itself it may be conceded, is the minute book of the Oregon Central Railroad Company, and that the minutes which embody the alleged copy of the alleged lost document are signed by the president and secretary of the corporation; but those facts contribute nothing in the way of legal evidence to prove that what is written

in the book is true, or that the purported copy of the document found therein was made from an original which had been duly executed and delivered. At most it amounts to no more than the unsworn statement of the president and secretary of that company, that what was so written by another party, A. J. Moses, is a purported copy of what Moses apparently copied.

When the books or records of a corporation are admissible at all, and "for the purpose of showing that the corporation passed the vote recited, adopted the resolution recorded, or enacted the by-laws spread out upon the minutes—whenever under the frame of the issues it becomes material or relevant to show that fact—and always subject to contradiction by proving the record to be a false one," (Thomp. Corp., 1st ed., sec. 7740), the books are admissible upon proof that they are the books of the corporation, kept by its proper officer. (*Ib.*, sec 7737). They are not subject to the same requirements of preliminary proof, to make them admissible, as are shop books, because they are not kept as shop books are, for the purpose of recording transactions had with other persons, in the usual course of business, and as part of the *res gestae*, but only for the purpose of recording the corporation's own acts and proceedings. The exigencies which gave rise to the adoption of the so-called "shop-book rule," as an exception to the rule excluding hearsay, are not related to, and have never been considered by the courts as furnishing a reason for relaxing the rule ex-

cluding hearsay with reference to corporate records; and when, as in this case, the book is sought to be used as evidence of the facts recited in it to prove on behalf of the corporation entries which are in its favor—to establish a title to real property—in a suit against a member or stockholder holding adversely, it is not admissible at all, no matter how, or to what extent, it may have been authenticated.

It follows, therefore, that what appellant's counsel now seek to show to the court as having been written in the book, is, under the circumstances, of no greater probative value than would be a repetition by some witness of what he might assert had been told to him by the president or secretary relative to what A. J. Moses had written in the book; or what A. J. Moses had told him about a document (nothing even being said as to whether it was a copy or an original) which he had copied into the book. It is the baldest kind of hearsay, and upon every known principle of law and rule of evidence is incompetent and inadmissible.

The following cases are squarely in point:

White vs. Rayburn, 11 Or. 450; 5 Pac. 345;
Masterson vs. Jordan (Tex. Civ. Ap.) 24
 S. W. 549.

In the later case, the facts are stated in the syllabus thus:

“As a circumstance to establish a lost deed of plaintiff's interest to defendant's grantor, an in-

strument purporting to be a copy thereof, and bearing the affidavit of such grantor, since deceased, that it is a true copy thereof, is not admissible in evidence, being a self serving declaration."

In the opinion the court say:

"Had the loss of the conveyance been properly made to appear, the copy verified by the affidavit of Morris would not, in our judgment, have been admissible, even as a circumstance tending to prove the existence and purport of such a deed. What is this instrument, but an *ex parte* affidavit of Morris, made in his own interest? It is nothing more than the declaration of a person, since deceased, that another had conveyed to him certain lands. Declarations of deceased persons are admissible for certain purposes, but not for a purpose of this character. * * * It would involve a radical change of the principles on which the rules of evidence rest, and introduce a dangerous element, to permit a statement of a party, made in his own interest, to become evidence of title, in the hands of those holding under him."

There was some argument by complainant's counsel in the court below addressed to the proposition that the minute book having been shown to be more than thirty years old, its contents should be admitted in evidence, as proof of the facts recited therein, in favor of complainant, under the rule applied to an-

cient documents . No attempt was made, however, to explain how or why a document which is intrinsically incompetent and inadmissible because of its self serving character, and under the rule excluding hearsay, can be rendered competent by reason of its age. I think the proposition is too plain and obvious to merit discussion, that the ancient document rule can only be applied to apparently original documents to dispense with proof of execution and genuineness when they are otherwise free from vice or disabilities. A document shown to be more than thirty years old, when attended by certain corroborative circumstances, creating a presumption of its genuineness, may, because of the difficulties of proving its execution, and the further presumption that the witnesses, by whom execution might be proved, are dead, be received without such proof; and that is the full scope and extent of the rule.

Gwinn vs. Calegaris, 139 Cal. 389.

It cannot be invoked or applied to make admissible documents which are inadmissible for other reasons than want of proof of execution and genuineness. If it could, it might serve to render admissible a document which was demonstrably a forgery.—if it purported to be more than thirty years old.

Nor can the rule be extended in its application to an alleged copy, and by presuming the correctness and authenticity of such copy and by piling presumption on presumption, justify the conclusion that there

was an original which was duly executed and delivered. The authorities are quite to the contrary.

“Where an original deed itself is produced which is an ancient document and it is found in the proper custody, it may be read in evidence, especially where there has been corresponding possession under it. (*Harlan vs. Woodward*, 79 Ky. 373). *But this rule has never been applied to a copy. We know of no principle by which age gives sanction to a copy.* (*Hedger vs. Ward*, 15 B. Mon. 106). (Our italics.)

Ball vs. Loughridge (Ky L. R.) 100 S. W. 276.

“The plaintiff urges that the age of the record, an age of more than half a century, together with the fact that her mother occupied the land for a time after the date of the record, creates a presumption that there was, in fact, an original of the record duly executed and delivered. It is true that when a document, apparently an original deed, and shown to be thirty years old or more, is produced, it may be received in evidence without other proof of execution. But this presumption of due execution applies only to originals, not to copies.”

McCleery vs. Lewis (Me.) 70 Atl. 540.

Some sanction has been given by courts to “office copies,” or copies found on public records required

by law to be kept; but the difference between the facts in cases of that sort and those in the case at bar is too radical to make the doctrine under which the rule has been applied in those cases of any assistance to complainant in this.

THE NIGHTENGALE CASE.

Complainant's counsel offered in evidence from the records of the Circuit Court of the United States, for the District of Oregon, in the suit of *John Nightengale and S. G. Elliott vs. Oregon Central Railroad Company and Oregon & California Railway Company*, (the latter complainant herein), the following:

- (1) Bill of complaint—Exhibit 54;
- (2) Amended joint answer of the defendants. Exhibit 61;
- (3) A stipulation between the attorneys for the parties to the effect that certain exhibits attached to the answer, including a purported copy of the instrument pleaded in the bill in the present suit, were true and correct copies of the originals,—Exhibit 53; and
- (4) An affidavit made by Ben Holladay, June 22, 1871, for the purpose of a certain motion made in the suit several years before the answer was filed.—Exhibit 52.

These pleading and files are, according to every known principle of law and rule of evidence, incom-

petent to prove the issue as to the existence, execution, delivery, and contents, of the alleged lost "agreement" pleaded in the bill in this suit; and the court below correctly so held.

As to the bill of complaint in that case, it is so manifestly irrelevant and incompetent that we are unable to perceive any purpose which counsel could have had in offering it, other than to increase the size of the record.

The stipulation is likewise so obviously incompetent that we are unable to divine upon what ground counsel can attempt to justify its introduction. Even if Ben Holladay had been a party to the Nightengale suit, the stipulation would not be admissible against him, or those in privity of title with him, in this suit.

In *Atcheson, T. & S. F. Ry. Co. vs. Sullivan*, 173 Fed. 463, the court has stated the rule applicable as follows:

"The statements of agents and attorneys authorized to act and admit for their principals in one suit, litigation or legal proceeding, are not admissible against their principals in another suit or proceeding, in which different issues are involved, without proof of their authority to act and admit in the latter suit or proceedings."

See also:

Miller vs. U. S., 133 Fed. 351;

Stone vs. Bank of Com., 174 U. S. 412;

Board vs. Sutliff, 97 Fed. 287;
Nicholas vs. Jones, 32 Mo. Ap. 664;
Weisbrod vs. Ry. Co., 20 Wis. 441;
Wilkins vs. Stidger, 22 Cal. 232.

But Ben Holladay was not a party to that suit, and, *a fortiori*, a stipulation or an admission made by attorneys for other parties, and not in any way acting as attorneys for Ben Holladay, cannot be evidence against him and in favor of one of the parties for whom the attorneys were acting.

The *answer* in the Nightengale suit has attached to it as an exhibit what purports to be a copy of the alleged lost instrument pleaded in the bill in the present suit, and it is alleged in such answer, by reference to that exhibit, that such a document was made and delivered. It was pleaded in the answer, and attached thereto as an exhibit, merely as a matter of evidence or inducement; and its existence and contents was not directly, but only incidentally or collaterally, an issue in that case.—if indeed it was an issue at all.

At the time this answer was made and filed in the Nightengale suit Ben Holladay was president of the Oregon & California Railroad Company, and the signature of said company to the answer purports to have been made thereto by Ben Holladay, as president, and A. G. Cunningham, as secretary; and the answer was verified by A. G. Cunningham, as secretary, upon information and belief.

As we understand, the theory of complainant's counsel in seeking to use this answer as evidence against the defendant in the present suit is, that Ben Holladay, having been the president of complainant at the time the answer was made, and as the complainant's corporate signature to the answer as one of the defendants in that suit *purports* to have been made by him as its president, it affords proof that Ben Holladay acquiesced in the truth of what was stated in the answer, and should be construed as an admission made by him against interest, even though he was not a party to the suit, and that by this process of proof the fact is directly reached as to the existence and contents of the alleged lost instrument.

When the answer was offered in evidence there was nothing said by counsel about any purpose of proving by it any circumstance of acquiescence, or an admission against interest, on the part of Ben Holladay. It was tendered simply as "the answer of the Oregon & California Railroad Company" in the Nightengale suit. As such it is a self-serving statement made for complainant's own benefit in that suit, and it is too elementary and clear to require discussion that it cannot be availed of by complainant as evidence in its own behalf in this suit.

Lunday vs. Thomas, 26 Ga. 526;

Safford vs. Horn, 15 So. (Miss.) 639;

I Starkey Ev., 184;

Dawson vs. Pogue, 18 Or. 94; 6 L. R. A.

176;

Edwards vs. Bates County, 117 Fed. 526;

Teller vs. Patten, 20 How. 125.

If the answer could, upon any conceivable theory of the law of evidence, or for any purpose, be admitted in this suit in its character as the *answer* which the complainant in this suit made as defendant in that;—if, for instance, it had been offered by *defendant in this suit* to prove an admission therein made by complainant as defendant in that suit,—we presume no proof would be required as to its character and authenticity, or that it was properly signed by the defendant corporation, for the purpose of making its contents binding upon it. But when the answer is offered by the *complainant* in this suit (the same party who made it to serve its own ends in another suit), against Ben Holladay, a third party, and who was in no sense a party to that suit, or to the answer, to show that he, by affixing his signature to it for the purpose of writing, or assisting to write, the defendant corporation's signature to it, thereby admitted or acquiesced in the truth of anything stated in it as against himself individually, it is not offered in its character as the answer of the defendant in that suit, now complainant in this; but it is, it must be, offered as an instrument bearing the signature of Ben Holladay (made in his capacity as president of complainant), and by which it is sought to be shown that he in his personal and individual capacity made certain admissions, either by direct statement or by acquiescence, binding upon his individual self. Con-

sidered as the answer of the Oregon & California Railroad Company it cannot be admitted at all. There must be a clear distinction drawn between the corporate entity and the individual; and a like distinction as to the dual character of the answer in its relation to each. As the answer of the railroad company it bears no relation to Ben Holladay the individual. If it bears any relation toward the latter, it is apart and distinct from its office as the answer of the railroad company, and because Ben Holladay read and knew its contents, and being under a duty to admit or deny those matters contained in it which it is now sought to be shown he admitted or acquiesced in, and that, having an opportunity of voluntary demeanor in that respect, he personally affixed his signature to it, and made it a written record of his own individual acts and conduct.

There can be no doubt or question but that when complainant's counsel seek to use the answer in this latter character and aspect, the law requires as an indispensable prerequisite, that they shall first prove that it has such character; that Ben Holladay signed it; that he read and knew its contents; that it was an act of voluntary demeanor on his part to have known its contents and to have signed it.

There is not a scintilla of evidence to prove that Ben Holladay signed the answer; or that he ever read or knew its contents. Nothing in the way of evidence addressed to the proof of any such facts was offered.

It is needless to cite authorities to the plain proposition that admissions, or conduct from which acquiescence can be inferred, are facts which must be proved by direct evidence. There is not a particle of evidence here to show that the purported signature of Ben Holladay appearing upon the answer was written by him, or with his knowledge, or by his direction.

“An admission is a fact to be proved by evidence rather than evidence to prove a fact—*levamen probationis* rather than *probatio*.”

1 Elliott Ev., sec 220.

“The pleading to be competent against a party in another action must contain an admission *made by him*.

1 Encyc. of Ev., p. 426 and cases cited.

The precise question presented here was before the court and was determined in

Carey vs. Williams, 79 Fed. 906:

“To prove the admission by the defendant, the plaintiff read, pursuant to a stipulation between the parties, a copy of an affidavit purporting to have been subscribed and sworn to by the defendant October 1, 1886. The stipulation provided that either party might read in evidence from the printed record in a certain equity cause, subject to any legal objection except as to the

form of a question, any deposition, record, book, document, or extract therefrom, 'proved or admitted' in such cause. The plaintiff also produced and read a copy of the same affidavit from an exemplified copy of a record in the suit of *Mayer vs. National Express and Transportation Company*. Thereafter he called upon the defendant to produce the original affidavit, and gave evidence sufficient to excuse its non-production by himself. He offered no other evidence tending to show that the defendant had ever subscribed or verified an affidavit in substance similar to the copy, or any affidavit whatever. * * *

"Obviously, all the evidence which was thus offered by the plaintiff was introduced for the purpose of making secondary proof of the contents of the original affidavit. It was incumbent upon him before he could complete his secondary evidence and avail himself of the copy of the affidavit as proof of the contents of the original, to show that the original had been made by the defendant. If he had produced the original affidavit itself, instead of a copy from the exemplification, and from the printed record in the equity cause, the document would not have proved itself; and it would still have devolved upon him, in order to establish an admission in writing by the defendant, to prove the defendant's signature, or to prove in some other way that the defendant had made the affidavit. The

copy read from the exemplification, and from the printed record in the equity cause, could have no greater force as evidence than the original affidavit would have had.

In *Masterson vs. Jordan*, 24 S. W. 549, the court say:

“It is easy to perceive that, if the instrument offered could become evidence, it would constitute direct proof of the existence of the conveyance, instead of a circumstance tending to prove that fact.”

If the proof of an admission by Ben Holladay could be made by the introduction in evidence of the answer in the Nightengale case, without proof of Ben Holladay's signature; and if from the admission thus shown the court could find that the further facts of existence, execution, and contents, of the alleged lost instrument, were thereby reached and established, it is perfectly clear that such proof would be tantamount to, and a substitute for, proof of execution of the original itself, if that were produced. In other words, we would have the exact equivalent, in a probative degree, of the original being offered and received in evidence without proof of its execution. Under such a theory the more debased the evidence offered should be, the greater would be the credit accorded it; and a party alleging a lost deed would have a distinct advantage over one producing an original.

Shorter vs. Sheppard, 33 Ala. 648.

Even if it were competent to admit the answer in the Nightengale suit without proof that Ben Holladay signed it, or that he read or knew its contents, but simply upon the presumption that he, having been the president of the answering corporation when the answer was made, assisted as such to make its corporate signature thereto, there would still be no *proof power* in the answer to establish the ultimate facts in issue in this case, viz: existence, execution, and contents of the alleged lost document.

The terms *admission*, and *acquiescence*, have distinct meanings in law. An admission is a direct and positive statement of fact, made either by the party himself, or by some one so identified in interest with him that he is chargeable with its consequences. Acquiescence occurs incidentally, circumstantially, or collaterally, and usually arises from negative conduct, as by a failure to affirm or deny a statement made in a party's presence when he was under a duty to speak. The answer in the Nightengale case could not under any theory be held to be an *admission* by Ben Holladay against interest. And this would be true whether its reception in evidence were based upon proof that he read and knew its contents, and signed it, or upon a presumption indulged that he did so because he was president of the corporation when the answer was made, and that it purports to bear his signature as president. *He was not a party to that suit, and it was*

not his answer. And this fact is conclusive of the question.

The first requisite to prove an admission is to prove the identity of the party whom it is sought to charge with its consequences. The admission must either be made by the party himself, or by some one identified in interest with him.

“It will thus be seen that in receiving the admissions of the party as such, the only question can be, who the party is. The probative process consists in contrasting the statements of the *same person* made now as litigant and made formerly elsewhere, and it is in that view that it becomes necessary to define the identity of the person.”

Wigmore on Evidence, sec. 1076.

Williams vs. Culver, 39 Or. 337;

Stevens vs. Crane, 116 Mo. —; 22 S. W. 783.

“In order to render such admissions competent, if not made by a party himself, the identity of interest of the party making them must be shown.”

1 Encyc. of Ev., p. 505 and cases cited.

That Ben Holladay was not a party to the suit in which the answer was filed is self evident. That no identity of interest between the corporations making

the answer and Ben Holladay, which would have the effect of giving to statements made by the former for their own purpose in defending the suit, admissions on behalf of the latter, is as clear and certain as it is that a corporation is a distinct legal entity.

In *J. J. McCaskill vs. U. S.*, 216 U. S. 504, the Supreme Court has said:

“Undoubtedly a corporation is, in law, a person or entity entirely distinct from the stockholders and officers. It may have interest distinct from theirs. Their interest, it may be conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge, is its knowledge, the counter presumption that, in transactions with it, when their interest is adverse, their knowledge will not be attributed to it.”

Considering, then, the theory that Ben Holladay should be held to have *acquiesced* in what is stated in the answer, by so presuming from the fact that he was the president of the answering corporation, and that the answer purports to bear his signature as such; and using this as a starting point, what would be the process by which the ultimate facts of existence and contents of the alleged lost document might be reached? It would be thus:

(a) A presumption that Ben Holladay wrote the signature purporting to be his, as president, to the answer.

(b) Based upon the foregoing presumption, another presumption that he read and knew the contents of the answer.

(c) Based upon the two previous presumptions, an inference that he acquiesced in all that is stated in the answer.

(d) Conclusion (itself a presumption) from the foregoing presumptions and inference, that the alleged lost instrument was executed and delivered as pleaded in the bill.

Presumptions are not evidence, because they are not facts, but only inferences drawn from facts. Such a process of attempting to arrive at a conclusion of fact results in nothing but the erection of a house of cards. If the conduct from which the inference of acquiescence is sought to be drawn is not established by affirmative and direct evidence, but is merely presumed from circumstances, it is very clear that it is but a piling of presumption upon presumption, which is "contrary to established legal principles governing the potency of evidence."

Chemical Co. vs. Lackawana Line, 78 Mo.
Ap. 305.

"No inference of fact or law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Ev., page 80 lays down the rule thus: 'In the first place, as

the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of a jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. *Best Ev.*, 95. A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption."

U. S. vs. Ross, 92 U. S. 218.

See also,

Manning vs. Ins. Co., 100 U. S. 693;

Western Travelers' Assn. vs. Holbrook, 91 N. W. 276;

Bigelow vs. Met. St. Ry. Co., 40 Mo. Ap. 367;

Moor vs. Rennick, 90 Mo. Ap. 202; 68 S. W. 963;

Ry. Co. vs. Henrici, 92 Pa. St. 434; 37 Am. Rep. 699;

More on Facts, Sec. 599.

"In order to prove a fact by circumstances there should be positive proof of the facts from

which the inference or conclusion is drawn. The circumstances themselves must be shown and not left to rest in conjecture, and when shown it must appear that the inference sought is the only one which can fairly and reasonably be drawn from these facts."

Rupert vs. Brooklyn H. R. R. Co., 154 N. Y. 90.

See also,

U. S. F. & G. Co. vs. Des Moines Nat. Bank, 145 Fed. 273;

C. R. I. & P. vs. Rhoads, 64 Kan. 553; 68 Pac. 58.

"The law does not permit one inference to be piled upon another. To have any probative force an inference must be logically and immediately connected with the fact proven. It cannot be so connected through the medium of an intervening inference."

Chemical Co. vs. Lackawana Line, 78 Mo. Ap. 305;

Swenson vs. Erlandson, 86 Minn. 263; 90 N. W. 543.

Even if it had been proved that the purported signature of Ben Holladay, as president, to the answer, was written by him, it could not be legally presumed from that circumstance that he had read, and knew, and acquiesced in what it contained. While it is true

that, in the absence of fraud, a *party* is presumed to know the contents of an instrument to which he has subscribed, such presumption can only be availed of as against one *who is a party* to the instrument.

Callock vs. Young, 66 Me. 549.

Signing an instrument as an attesting witness creates no presumption that such witness has notice of the contents of the instrument.

Hill vs. Johnson, 38 N. C. 432.

Ben Holladay did not verify the answer, and there was no duty cast upon him in the performance of the office of president to have informed himself of its contents, distinctively from the knowledge which the corporation, by its attorneys, and through its board of directors, would be presumed to have had. There was nothing stated in the answer with reference to the alleged lost instrument which formed a part of the *res gestae* in the alleged making of such instrument.

“Silence and apparent acquiescence to be effective as an admission must be such, or under such circumstances, as to ‘*exhibit some act of voluntary demeanor or conduct*’ of the party sought to be charged with the admission.”

People vs. Koerner, 154 N. Y. 335;

1 Elliott on Ev., Sec. 230.

It was not voluntary demeanor, in the sense of the above quoted language, on Ben Holladay’s part, to

have participated as president of the corporation in making its signature to the answer, and which would thereby charge him with knowledge of and assent to what was stated in it. The answer was prepared and drawn by attorneys employed by the company, who represented and were responsible to the board of directors, and to the court, for what it contained. The attorneys were not responsible to Ben Holladay, either as an individual, or as president of the corporation nor was Ben Holladay responsible, either individually or as president, to the corporation for the manner in which its attorneys,—presumably acting under appointment and by authority of its board of directors,—prepared or drafted their pleadings, or conducted the company's litigation. The corporation is not its president, nor is the president the corporation. The president has certain powers and duties which attach to his office; but he does not, nor is he presumed to, embody within his individual sphere all the functions of the corporate entity. The corporate functions are necessarily exercised through the co-ordinated powers and duties of many individuals, acting as officers and agents, serving a common purpose, and to effectuate a common design.

The attorneys of the Oregon & California Railroad Company who prepared the answer and made it ready for the legal signature of the corporation were clothed with an authority, and exercised a function in the affairs of the corporation, entirely distinct and independent of that exercised by the president. The

court will take judicial notice that the character of their employment as attorneys and officers of the court invested them with an authority and function which the president of the corporation, solely as such, could not invade; and the attorneys were necessarily the agents of the corporation—and exclusively so—who controlled and directed the litigation, and determined what should be stated in the answer, and prepared it accordingly. When that was done it called into exercise the perfunctory duties of the president and secretary to make the corporation's legal signature to it. But the performance of that formal act was not the act of those officers, but the act of the corporation; and it did not call for an examination and censorizing of the contents of the document by the president. He was not to verify it, and was in no sense, either individually or as president of the corporation, sponsor for what it contained; and if the answer had stated the direct converse of what it contains, his part of the corporation's signature would have been there just the same. The signatures of the officers go to make up *in globo* the corporate execution, and cannot be separated to attach notice to the constituent signatories.

“The term presumption, in its legal significance, * * * is the probable inference which common sense, enlightened by human knowledge and experience, draws from the connection, relation and coincidence of facts and circumstances with each other.

Elliott on Ev., Sec. 77.

There is no such basis for the presumption suggested in this case, for it is the common knowledge and experience of every person who has ever had an opportunity to observe, that officers of such corporations as railroad companies, and which maintain a legal department as distinctively as they do a managerial department, do not read the pleadings which the attorneys for the companies place before them for the ministerial act of effecting the corporations' legal signatures. In most cases the officers are laymen, unacquainted with legal phraseology, and their reading of the pleadings would, ordinarily, be a mere idle-ceremony.

When the truth is present in its undisguised and naked form, it furnishes, of course, a safe criterion to courts for the determination of disputed questions of fact. But when the truth is only to be sought for in the shadows of past transactions—transactions more than forty years old, and which have been allowed to moulder in obscurity during that long period by the party who now seeks to reproduce them, and who now for the first time seeks to utilize them as the basis of asserting title to real property as against a known title standing of record all of that time,—and the court is asked to presume the truth therefrom, it must, it seems to us, base its conclusion and judgment upon what at this time appears to be most reconcilable with what “common sense, enlightened by human knowledge and experience,” tells it are the most

probable. And we submit that "common sense, enlightened by human knowledge and experience" point to the very strong probability that Ben Holladay, as an individual, did not know the contents of that answer. The corporation is presumed to have known its contents, because it was the corporation's answer; and its board of directors must likewise be presumed to have known its contents, because the corporation could only have had knowledge through their knowledge, and their knowledge, for the purpose of imputing knowledge to the corporation, does not depend upon whether they in fact and as an actuality had such knowledge or not. The presumption that they did is a fiction inherent in and a necessary concomitant of the primary fiction of the corporation's legal entity.

But to charge Ben Holladay with such knowledge, as an individual, so as to affect or influence his personal legal rights, or the rights of his legal representatives, actual knowledge on his part must be shown, for the knowledge which he might be presumed to have had as president of the board of directors, and which does not depend upon the fact of his having had actual knowledge, but upon a fiction, cannot be imputed to him in his personal and individual capacity to conclude or influence his individual rights.

"Where the party sues in a *representative* capacity—*i. e.*, as trustee, executor, or administrator, or the like,—the representative is distinct from the ordinary capacity, and only admissions made before or after incumbency are admis-

sible. *Conversely, his admissions as executor or the like would not be receivable against him as a party in his personal capacity."*

Wigmore on Ev., Sec. 1076;

Stevens vs. Crane, 116 Mo. —; 22 S. W. 783.

"Affirmative evidence must be produced by the proponent to the effect that the statement was a definite declaration of fact; and that the party actually heard and understood it. In other words, the silence must amount to voluntary demeanor.

Chamberlayne's Modern Law of Ev., Sec. 1423.

Ben Holladay was under no legal duty, even if it were shown that he in fact, and in his personal capacity, knew the contents of the answer, to have either denied or affirmed the making of the alleged lost document. It was not *his* answer that was being made; and whether or not the instrument was ever made was not an issue in that case. The proof or negation therein of the making of the alleged instrument would not have established that fact as against Ben Holladay, or affected his individual interest in any relation which the alleged instrument might have borne to it. As to him, the fact, if established, would have been *res inter alios acta.*

Thomas vs. Gage, 144 N. Y. 506;

People vs. Koerner, 154 N. Y. 374.

Knowledge by a party of the contents of a document does not of itself imply assent to the truth of the proposition stated in it.

Casey vs. Leggett, 125 Cal. 664;
Razor vs. Razor, 149 Ill. 621;
Com. vs. Eastman, 55 Cass. 189;
Packer vs. U. S., 106 Fed. 906;
Van Renselaer vs. Clark, 17 Wend. 25.

And even if Ben Holladay had possessed knowledge of what was contained in the answer, that circumstance, connected with the mere perfunctory act by him of assisting to make the corporation's legal signature, would not be sufficient to charge him with an admission, because of anything contained in the answer, which would furnish proof of the existence of the alleged lost agreement. Acquiescence is but a circumstance at most. It is not direct or positive evidence. It is not of sufficient probative weight or value by itself to establish the existence of a fact in issue.

"The inference of acquiescence from failure to deny a written statement is by no means of conclusive force. Such silence is merely one circumstance, to be weighed with others, bearing upon the truth of the statement itself."

Chamberlayne, Modern Law of Evidence,
 Sec. 1410.

"Even admissions from acquiescence in verbal statements made in a party's presence, are re-

ceivable only where the declaration or statement made is of a kind which calls for immediate contradiction, or is such as would probably provoke or would lead to some action or reply on the part of the person to whom, or in respect to whom, it is made, because inference from a party's preserving a silence is a very dangerous kind of evidence, and is to be kept within very strict limits."

Waring vs. U. S. Tel. Co., 4 Daly 233.

"Slight presumptions, although sufficient to excite suspicion, or produce an impression in favor of the truth of the facts they indicate, do not, when taken singly, either amount to proof, or shift the burden of proof. (Best on Presumptions, 41.)"

Corner vs. Pentdleton, 8 Md. 337.

And if the inference of acquiescence could, on any theory, be drawn, it would be the only circumstance having any probative weight admissible in this case to prove existence of the alleged lost instrument; and its admission, and its weight and sufficiency, for that purpose, was a question within the province and discretion of the court below to determine.

"The legal presumption is that the finding and decree of a court of chancery are right, and they should not be disturbed or modified by an appellate court unless an obvious error has intervened in the application of the law, *or some grave mis-*

take has been made in the consideration of the facts." (Our italics.)

Manhattan Life Ins. Co. vs. Wright, 126
Fed. 82;

Evans vs. Louisiana, 141 U. S. 107;
Bix Six Dev. Co. vs. Mitchell, 138 Fed. 279;
Dodge vs. Norlin, 133 Fed. 363;
Paulus vs. M. M. Buck Co., 129 Fed. 594;
Board of Com'rs vs. Irvine, 126 Fed. 689;
Order, etc. vs. M'Adam, 125 Fed. 358;
Harding vs. Hart, 113 Fed. 304;
Thallman vs. Thomas, 111 Fed. 277.

As to the *affidavit* of Ben Holladay,—Exhibit 52,—the extraordinary and absurd thing about it is that counsel for complainant have endeavored to make it appear to contain statements which it is perfectly patent to any person reading it that it does not contain. There is absolutely nothing in it, either directly or inferentially, proximately or remotely, touching the alleged existence or contents of the instrument pleaded in the bill; or which furnishes evidence of any kind or degree in support of that issue. The affidavit is a lengthy affair, and we are unwilling to occupy space in this brief, or to take up the time of either the court or ourselves in discussing what, upon a reading of the affidavit, must demonstrably appear to be the absurdity of the pretensions of appellant's counsel in the court below concerning it.

COMPLAINANT'S PROOF OF THE LOSS OF THE ALLEGED DOCUMENT.

It is alleged in the bill, on information and belief, that the alleged document was destroyed in the San Francisco fire of April 18, 1906. The evidence shows conclusively that no such document was ever in the company's possession in San Francisco. (See testimony of Eberlein (Rec. p. 816). It is further clearly shown that about March, 1905, Wm. D. Fenton, then attorney for the appellant company (now one of its counsel in this suit), was instructed by the then land agent of the company, C. W. Eberlein, to investigate the title to the land involved, and ascertain what, if any, title the company had to it; and Mr. Fenton, who then had access to all of the papers, records and files of the company, reported and advised that the company had no record title, and that the land should be fenced for the purpose of initiating a title by adverse possession. It appears that at the time Mr. Fenton did not know of the original of the alleged document being in existence. And if he was then informed as to the alleged copy in the minute book of the Oregon Central Company, he did not consider it as furnishing the basis of either a legal or an equitable title in the complainant company.

It is further clearly shown by complainant's exhibit 8,—“O. & C. R. R. Co., Secretary, Records Deeds, Contracts, Agreements, etc.”—that it was not in the possession of appellant company at the time that record was commenced to be kept—in 1883, or 1884,

(Rec. p. 702). Nor is there shown anywhere, by any of the company's records, introduced in evidence, any trace of the alleged document ever having been in the company's possession; nor by any witness that it was ever seen in its possession. Mr. Koehler, whose official connection with the company dates since 1874, and whose duties brought him in close and familiar relations with its records and corporate documents, never saw the original. The record is absolutely barren of any evidence of the alleged document ever having been in the company's possession at any time or place.

PROOF OF SEARCH FOR THE ALLEGED LOST DOCUMENT.

The only suggestion in the record that the alleged lost document might ever have been in the possession of any person, is what appears by the incompetent stipulation in the Nightengale case—complainant's exhibit 53. The firm of Dolph, Bronough, Dolph & Simon were the attorneys of the appellant company in that suit, and made the stipulation on its behalf. Mr. Dolph and Mr. Simon are both living, and practicing lawyers, in the City of Portland, Oregon, and presumably know in whose possession and where the files of the old firm are.

Considering that the stipulation suggested to complainant's counsel the only trace of the possible existence or possession by any one of the alleged document (and since they made that fact known to the

court by offering that incompetent stipulation in evidence), it was undoubtedly legally required of them that they should, as a condition precedent to asking the court to admit secondary evidence of its contents, prove a search made for it among the papers and files of the firm of Dolph, Bronough, Dolph & Simon, or their successors. Mr. Dolph was called and examined as a witness by complainant, but in giving his testimony no allusion was made to this subject. Either complainant's counsel themselves did not believe the stipulation spoke the truth, or they neglected a vital link in their chain of proof.

“As a general rule, however, we may say that when, from the ownership, nature, or object of a paper, it has properly a particular place of deposit, or where, from the evidence, it is shown to have been in a particular place, or in particular hands, then that place must be searched by the witness proving the loss, or the person produced into whose hands it has ben traced.”

Wiseman vs. Nor. Pac. R. R. Co., 20 Or.
425.

“Where the last known custodian is deceased, search should be made among the papers of the deceased and his representatives, and the latter should be produced to testify to the search they have made.”

8 *Encyc. of Evidence*, p. 354 and cases cited.

See also:

Rogers vs. Durant, 106 U. S. 644;
De Lane vs. Moore, 14 How. 253;
Graff vs. Pittsburgh, 31 Pa. St. 494;
Christy vs. Cavanaugh, 45 Mo. 375;
Singer Mfg. Co. vs. Riley, 80 Ala. 314;
Reynolds vs. Quattlebaum, 2 Rich. (S. C.)
 140.

There is no evidence in this case that the alleged lost document ever existed; but if there had been any evidence, which it would be proper for a court to consider, as tending to prove that fact, then the evidence of search for such a document submitted by complainant would be wholly and fatally deficient. Upon any possible view of the case which could be taken upon the record, there is presented to the court this dilemma: *either there is no evidence that the document ever existed, on the one hand, or, if there were, there is no evidence of a proper search made for it on the other.*

“No hard and fast general rule governing the sufficiency of a search has been formulated and enforced by the courts, but each case is left to be determined by the presiding judge from a consideration of all the facts and circumstances appearing.”

8 *Encyc. of Ev.*, p. 352 and cases cited.

In the present case there is, of course, nothing to

indicate what view the court below may have taken as to the sufficiency of the proof upon this question, other than the fact that (according to the opinion filed), complainant had not proved the existence and contents of the alleged lost instrument. We think, however, that upon the decision rendered it would be suitable to presume that the court, in the exercise of its discretion, found the evidence of search insufficient. But whether this is true, or not, it is clear from the decisions of the courts in adjudicated cases, that the evidence tendered by complainant, in this case, does not come up to the standard of proof required.

The only evidence offered to show search was that of the witnesses Steel and McAllister. Mr. Steel testified that he was assistant secretary of the Oregon & California Railroad Company, and had the custody of its papers, of the nature of the one in question, for Mr. W. W. Cotton, who was the secretary. His testimony as to a search made consisted of the following, (Rec. p. 851):

O. Mr. Steel, have you looked among the records of the office of the secretary of the Oregon & California Railroad Company, where any such document would be likely to be found for the agreement of Ben Holladay & Co., recorded in the minute book of the Oregon Central Railroad Company, at pages 175 or 176 thereof, purporting to be signed by Ben Holladay & Company, and Ben Holladay and C. Temple Emmett,—the record of the instrument to which I refer is

found at pages 175 and 176 of the minutes of the Oregon Central Railroad Company at Salem, entered under date of March 28, 1870,—that is the instrument you searched for?

A. Yes sir.

Q. Were you able to find it? A. No.

Q. Did you ever see that document? A. No sir.

In answer to a leading question asked by counsel of the witness McAllister (and which was objected to upon that ground, as was also the above quoted question to Mr. Steel), Mr. McAllister stated:

“I *have had* the files and storage places thoroughly searched time and again for all these documents without being able to find them.” (Rec. p. 773.)

In *Shepard vs. Pratt*, 16 Kan. 212, opinion by Justice Brewer, the court said:

“I have made strict and diligent search for said order, but cannot find the same; and as far as I can ascertain it is lost. Said order was directed to me as agent for the firm of Gregory, Strador & Co., who were at that time engaged in the livestock commission business, and said order was in substance as follows:” (quoting witness). *

"The witness has substituted his own opinion of the character of the search for those facts upon which alone the court can determine whether a sufficient search has been made. No one can tell from this statement *where* the witness searched; *when* or *how long* he searched; *where* and *when* he last saw the order; or any other fact concerning its loss. No sufficient foundation was laid for secondary evidence of its contents."

See also, to the same effect:

Wiseman vs. N. P. R. R. Co., 20 Or. 425; 26 Pacfl 272;

Harmon vs. Decker, 41 Or. 587;

Boswick vs. Miller, 21 Or. —;

Booth vs. Cook, 20 Ill.;

Brock vs. Cottingham, 23 Kan. 383;

Loewe vs. Reisman, 8 Ill. Ap. 525;

Weidenfeld vs. Gallagher, 24 S. W. 333;

Kearney vs. Mayor, 92 N. Y. 617;

Bacheldor vs. Hatie, 50 N. Y. S. 663.

Mr. Steel's answer, in response to a leading question, stated absolutely nothing but his conclusion as to the degree of diligence he exercised in making the search, and is clearly not the character or degree of proof required, under the foregoing authorities, in a case where the document sought to be established by secondary evidence is the primary issue, and is of so great importance as the alleged lost document in this case.

The testimony of the witness McAllister is still worse, for besides stating only a conclusion of the witness, in answer to a leading question, he only states hearsay. Asked the question as to whether or not he had made a search (not what search he had made), he answered that he *had had* "the files and storage places," etc., searched. He does not say that *he, himself*, made any search whatever. By whom did he have the search made? By the office boy? By the colored janitor? Could the person who made the search read, and would he have known the instrument if he had seen it? What files, and what storage places were searched? Did the person making the search know in what files or storage places it might be found; or did he search *all* the files and storage places?

Of course the testimony of Mr. McAllister is wholly immaterial, because it is conclusively shown that the alleged document was never in the land department in San Francisco, the files and storage places of which he says he had searched.

EVIDENCE TO ESTABLISH A LOST DEED MUST BE CLEAR AND CONVINCING.

Where a party attempts to establish an unrecorded and unknown title to real property, by means of an alleged lost deed, and as against a clear title of record, all of the authorities hold that he must prove the existence, execution, and contents, of the alleged instrument, by *evidence that is clear and convincing*.

Thomas vs. Ribble (Va.), 24 S. E. 242;
Peters vs. Worth, 164 Mo. 431; 64 S. W.
 490;
Metcalf vs. Van Benthuyssen, 3 N. Y. 424;
Edwards vs. Noyes, 65 N. Y. 127;
Nessly vs. Ladd, 29 Or. 354; 45 Pac. 904;
Shorter vs. Sheppard, 33 Ala. 648;
Garland vs. Foster, (N. D.) 92 N. W. 452;
Rankin vs. Crow, 19 Ill. 626;
Ives vs. Ashley, 97 Mass. 198;
Jack vs. Wood, 29 Pa. St. 375;
Capell vs. Fagan, 77 Pac. (Mont.) 55.

The authorities so holding are very numerous, and we have cited but a few of them.

“A conveyance of land cannot be proved by parol evidence of the contents of a lost paper, unless it be proved the paper was a deed, legally executed.”

Dunlap vs. Glidden, 31 Me. 510.

The lost deed must be shown to have been executed with all the formalities required by law.

Roe vs. Roe, 32 Ga. 50;
Wakefield vs. Day, 41 Minn. 344; 43 N.
 W. 71;
Ellton Land Co. vs. Denny, 108 Ala. 553;
 18 So. 561;

There certainly is no evidence in this case addressed to the proof of existence, or contents, of the alleged instrument, which can be considered *clear and convincing*. And not only is this true, but, governed by the settled rules by which the trustworthiness, reliability, and competency of evidence is tested and weighed in the administration of the law by courts of judicature, as manifested by the authorities to which we have referred, *there is no competent evidence at all addressed to that issue.*

And there is no evidence whatsoever, either direct or circumstantial, in proof of the execution of the alleged lost document.

“The execution of a lost deed must be quite as strictly proved as if the deed were produced in court.”

Edwards vs. Noyes, 65 N. Y. 125;

Owens vs. Thomas, 33 Ill. 320

Mariner vs. Saunders, 10 Ill. 113.

And see also,

Carey vs. Williams, 79 Fed. 906;

Jack vs. Woods, 29 Pa. St. 375;

Ives vs. Ashley, 97 Mass. 198.

It is only because complainant's counsel desire, and attempt, to persuade the court to depart from these settled rules of evidence, and to set aside and disregard them, for the purpose of awarding to complain-

ant the title to the property involved, that this case is now before this court. The only argument the counsel have made, or can make, to justify the prosecution of this litigation, is that the minute book and the pleadings and files in the Nightengale case should be admitted in evidence in defiance of these settled rules, and as to which Judge Sanborn has said in

Board of Com'rs vs. Keene, etc. Bank, 108

Fed 510:

“The settled rules of evidence which govern the trial of actions measure the extent and secure the protection of the rights of persons and property. Reversals, modifications, or variations of these rules produce instability and uncertainty in these rights, and breed distrust of courts and governments.”

And the only theory the counsel advance in support of their contention is that the competency of the documentary evidence offered should be conceded, dogmatically, because of the claim made that their contents are so plausible that their truth should be taken for granted. In the court below they argued that the minute book should be held competent, and should be admitted to prove the existence, execution, and contents, of the alleged lost document, because there purports to be copied into it other documents claimed to be related to the one pleaded, although no pretense, however slight, was made of laying a foundation for admitting secondary evidence of

such other documents The position of counsel in this respect is properly characterized in the language of the court in

Mudgett vs. Horrell, 33 Cal. 25, (quoted in *Carey vs. Williams*, 79 Fed. 906) :

“There is a species of absurdity in holding that the books were admissible evidence to prove the very fact on which their admissibility depended.”

The appellant in this case is, as said by Chief Justice Marshall in

Taylor vs. Riggs, 1 Pet. 591,

“In the condition of every other suitor in court who makes a claim which he cannot support.”

ADVERSE POSSESSION.

The complainant alleges in its bill, and claims that it has established by the evidence, a title acquired to the land involved by adverse possession. As hereinbefore stated in “Appellee’s Statement of the Case,” the evidence of complainant’s possession is entirely comprehended in the following:

(1) An examination of the land by an employe of complainant, in 1889, or 1890, to appraise its selilng value; and ten or twelve occasional and incidental visits to the land by the same employe in ten or twelve years.

(2) A survey made by the county surveyor of Clackamas County in 1894, at the instance of complainant; and a visit to the land by the complainant's agent, and his chief clerk, the same year, to inspect the survey and the monuments established by it.

(3) A contract made by complainant with E. F. Hall, in 1894, assuming to give the latter the right to cut some wood on the southerly portion of the land,—the "Elliott tract."

(4) Making a claim against Clackamas County for gravel taken from the "Gridley tract," "between 1890 and 1900."

(5) Inclosing the land with a fence in March, 1905.

The court below decided that these acts were not sufficient to create a title by adverse possession, and we do not see how there can be legitimate dispute or discussion as to the soundness of that decision.

Complainant has not shown color of title as a basis for its claim of adverse possession. It has not shown any apparent paper title. If the instrument pleaded in the bill had been established, and if it could be construed to be a deed, it could not be admitted in evidence as such, for any purpose, because not properly stamped; and there being no land described in it, it could not serve as color of title.

“In order to entitle a party to the benefits of an extension of his possession by construction, it is essential that the deed or writing should describe the land not actually occupied; and if the land is not described in the writing in such a manner that it can be readily identified, the doctrine relative to construction cannot apply, and the party must stand or fall by his actual occupancy.”

Wood on Limitations, (3rd ed.) Sec. 269.

And see

Wilson vs. Johnson (Ind.) 43 N. E. 930;
Blondin vs. Brooks, 83 Vt. 472; 76 Atl. 184;
Johnson vs. Case, 131 N. C. 491; 42 S. E.
 957;

Wood vs. Conrad, 2 S. D. 234; 50 N. W.
 95;

La Roche vs. Fallagant, 130 Ga. 596; 61
 SE 465;

Hamilton vs. Trahan (Texas), 97 S. W.
 147;

1 Am. & Eng. Encyc. of Law, (2nd ed.) p.
 858.

While the acts above enumerated might be considered as showing a claim or right made by complainant, there is no authority anywhere for the contention that they are evidence of adverse possession. It may be, too, that complainant, in the office of its land department, claimed to own the land (that would

occur by force of habit) ; and that, as complainant has attempted to show, other persons may have thought of the land as belonging to it; but whatever claim it may have made was not connected with any possession, of any kind; nor was it based upon any apparent paper title or right of any nature. The acts referred to certainly did not constitute *actual* possession, nor was any reputation of ownership based upon any use or occupation of the land by complainant.

Real Estate Co. vs. Hendrix, 28 Or. 497; 42 Pac. 514.

“A claim without title or possession never ripens into a title.”

Hillman Land Co. vs. Marshall, 119 S. W. 180;

Cooper vs. Blair, 50 Or. 394; 92 Pac. 1074;
Eastern Oregon Land Co. vs. Cole, 92 Fed. 951;

Yharis vs. Jones, 122 Mo. 125; 26 S. W. 132.

The record is wholly silent as to any acts on complainant's part done upon the land, constituting incidents of ownership, or possession prior to 1889, or 1890; and the uncontradicted, and manifestly true, testimony of Con Battin and A. O. Battin (Rec. p. 937), shows conclusively that although the land was capable of use for residence purposes, could have been cleared and put under cultivation, was suitable for use as pasture, and so used by any person who chose

to use it, from the time they knew it in 1882, no such use, nor any other use or occupation, was ever made of it by complainant; and that it was never enclosed prior to March, 1905. That they never knew of any claim ever having been made by complainant to any one in the neighborhood that it owned the land, or of any warning given by it to persons who used it freely as pasturage that it claimed to own it, or that they should cease to trespass upon it. It was open common until it was fenced in March, 1905.

“Unimproved and unoccupied land is presumed to be in the possession of the person holding legal title.”

Butler vs. Smith, (Neb.) 120 N. W. 1106;
Herbage vs. McKee, (Neb.) 117 N. W. 706;
Havemeyer vs. Superior Court, 87 Cal. 273.

Adverse possession will not be presumed, and the burden of proving it is on the party alleging it.

Rowland vs. Williams, 23 Or. 515; 32 Pac. 402;

Monk vs. Wilmington, 127 N. C. 322; 49 S. E. 345;

Bradtl vs. Sharkey, (Or.) 113 Pac. 653.

“While lands remain in a state of nature there cannot be adversary possession against an elder title, except by such acts of ownership as change their condition.”

Koiner vs. Rankin, 11 Gratt. 240;

Harmon vs. Ratcliff, 93 Va. 249; 24 S. E. 1023;

Talbot vs. Cook (Or.), 112 Pac. 709;

Ozark Land Co. vs. Leonard, 20 Fed. 881.

The law governing the creation of titles by adverse possession is, of course, a rule of property. Where the statute fixes the period of limitation within which a title by adverse possession may accrue, the law is, we believe, controlled by the statutes and the decisions of the state courts prescribing its necessary requisites. The statutes of Oregon provide:

“Within ten years, action for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within ten years before the commencement of such action.”

Lord's Oregon Laws, Sec. 4.

The law of Oregon prescribing the requisites of adverse possession has been clearly and comprehensively stated by former Chief Justice Bean (the same learned jurist by whom the present case was heard in the court below), in the case of

McNear vs. Giustin, 50 Or. 377; 92 Pac. 1075.

“Occupancy of land necessary to constitute a title by adverse possession must be continuous, open, notorious, and exclusive, during the entire time required by the statute of limitations. There is no particular manner by which such possession may be indicated or made manifest, and no particular act or series of acts are required to be done on the land. There must, however, be actual use and occupancy, continuous for the necessary length of time, of such an unequivocal character as will indicate to the owner an assertion of an exclusive appropriation and ownership. In short the acts of the alleged occupant must be so open and exclusive as to leave no inquiry as to his intention, so notorious that the owner may be presumed to have knowledge that the occupancy is adverse, and so continuous as to have furnished a cause of action every day during the required period. Acts not so continuous and of brief duration do not constitute such an adverse possession as is contemplated by law.”

And see the following cases, all in accord with the above:

Hamilton vs. Flourney, 44 Or. 79; 74 Pac. 483;

Chapman vs. Dean, (Or.) 115 Pac. 154;

Gardner vs. Wright, 49 Or. 609; 91 Pac. 286;

Muckle vs. Good, 45 Or. 230; 77 Pac. 743;

Joy vs. Stump, 12 Pac. 929;

Wilson vs. McEwan, 7 Or. 87;

Willamette Real Est. Co. vs. Hendricks, 28 Or. 497;

Eastern Oregon Land Co. vs. Cole, 92 Fed. 951;

Ward vs. Cochran, 150 U. S. 597;

For a case peculiarly similar to the case at bar upon the facts, see

Eylton Land Co. vs. Denny, 18 So. 561.

When the well phrased logic of the above quoted decision by Judge Bean is applied to the facts presented here, the necessary result is so pronounced and manifest that it appears to us it would be supererogation to attempt further discussion of the subject.

We beg to make this further observation, however, that it does not appear that complainant ever based any claim of ownership or right of possession upon the alleged lost instrument, until the possession which was sought to be taken by fencing the land in March, 1905, was disturbed by the action in ejectment brought by the defendant herein. It appears that the alleged document was never thought of as giving complainant any right to the land until the commencement of

this litigation, when its counsel seem to have be-
thought themselves that it might be feasible to plead
and attempt to establish such a document, and use
it as a basis for claiming the land. From the facts
and circumstances disclosed upon the record, this con-
clusion is, we believe, necessary and unavoidable. And
the fact that complainant abandoned whatever pos-
session it acquired by inclosing the land with a fence
in March, 1905, to the *land company*, without any at-
tempted transfer of a claim of title, ownership, or
right asserted by complainant, is not only an admis-
sion conclusive against complainant that it never had
any possession of the premises connected with any
supposed rights springing from the alleged and apo-
cryphal instrument pleaded, (and the existence of
which complainant never had any proof of, other
than the purported copy in the Oregon Central Com-
pany's minute book), but the fact, as testified to by
complainant's land commissioner, McAllister, that
the purpose of abandoning the possession to the land
company, and of seeking to effectuate a title by ad-
verse possession in the latter, was to evade the lien of
the mortgage held by the Union Trust Company,—
and attaching to the land if it belonged to complainant
company,—and to thereby circumvent the bondhold-
ers, estops complainant from asserting otherwise.

Upon this aspect of the question of adverse posses-
sion the language of this Court in a recent case is
peculiarly apposite:

“These facts fully justified, we think, the trial

court in saying at the close of the evidence that the entry of Bryant and his wife was without any pretense 'of having a right as owner of the property at the inception of their entry, which is necessary to make out a title by adverse possession. This idea of acquiring a title by larceny does not go in this country. A man must have a *bona fide* claim, or believe in his own mind that he has got a right as owner, when he goes upon land that does not belong to him, in order to acquire title by occupation and possession.' "

* * * *

"It is the general doctrine of these decisions, and it is the generally accepted doctrine, that a mere squatter can never obtain title by adverse possession; that to constitute adverse possession under a claim of title, the claim must be a distinct claim of title, and not a general assertion of ownership, connected with no source from which it is claimed to be deraigned."

Jasperson vs. Schnarikow, 150 Fed. 571.

If complainant ever believed that such a document as it now pleads ever existed, and that it created a basis of ownership of this land, why did it not attempt to establish its rights founded upon it during the forty and more years that it now claims such rights existed, rather than seek to have another corporation, (perhaps a dummy—it does not appear who

owns or holds its stock), gain a title by adverse possession?

Davis vs. Judson, 159 Cal. 121.

PAYMENT OF TAXES.

The manner in which the land was assessed since and including 1873 is admitted. The payment of taxes, however, except for the years 1906 to 1910, both inclusive, is not admitted, and is not proved.

There is no statute of Oregon authorizing certified copies of tax records to be used in evidence in the place of the original records. The authorized manner of proving tax records is embodied in L. O. L., sec. 3733—"The entries made in the assessment and tax rolls, the warrants and certificates thereto attached, in the county clerks', county treasurers', and tax collectors' books, receipt and certificate stubs, and duplicates recorded by the county clerk, county treasurer or tax collector, or his deputy, shall be *prima facie* evidence in all judicial proceedings."

It is, of course, elementary, that where a statute provides what shall be *prima facie* evidence to prove a given fact, neither secondary evidence of what is so declared to be *prima facie* evidence, or of other primary evidence which would supply the place of that provided by statute, can be given without first showing that the *prima facie* evidence referred to in the statute does not exist. In this case the records which are by statute made *prima facie* evidence do exist, and

instead of offering them in evidence, complainant has endeavored, over defendant's objection, to have the witness Mulvey,—county clerk of Clackamas County, and who is by law made the *custodian* of the records,—read from them and give his interpretation of them, and to have his reading and interpretation of them, incorporated into the record as evidence. Of course, Mr. Mulvey, as county clerk, had no authority to read into the record of this case what the tax records contain, or to have his interpretation of those records given in evidence, than the janitor of the county building where the records are kept would have had. The records themselves, *with reference to the payment of the taxes*, should have been offered and properly identified as exhibits, so that the court might place its own interpretation upon them and deduce whatever may have been deducible therefrom, relevant to this case.

At the close of the examination of the witness Mulvey, complainant's counsel made the statement that,

“Counsel for complainant here states that he desires to have it appear on the record that these original records were produced by the county clerk of Clackamas county, and that they are now here for the inspection of counsel, and are offered in evidence with the understanding that they may be withdrawn and left with the county clerk of Clackamas county.”

Of course complainant's counsel did not by this

simple expedient shift the burden and responsibility of proving the facts relevant to his case by competent evidence, and by a proper mode of procedure, to the counsel for defendant. It was not by the grace of complainant's counsel that the records were there for the inspection of defendant's counsel; nor did the fact that defendant's counsel had available the opportunity to inspect the records relieve complainant of making the proper proof.

The testimony of the witness Mulvey is clearly incompetent, and the records themselves were not offered in such a way as to bring them within the cognizance of the court.

Suppose it had been necessary for the defendant in this suit to get up a record on appeal, and to incorporate therein the tax records, or portions of the tax records, which complainant's counsel desired to have admitted in evidence, how would she have ascertained what records, or portions of records, were to be included? Resort could not be had to the testimony of Mulvey for that purpose, for he did not identify any records or portions of records which complainant desired to have received; and Mulvey's evidence, otherwise than to identify the records, is incompetent. And the same would be true in seeking the production of the records before this court. Not being identified, there is nothing from which either the court or counsel for defendant can know what records or portions of records complainant desired or intended should be introduced.

Clearly there is no evidence before the court showing the payment of taxes other than for the years 1906-1910, when they were paid by the *Land Company*. Complainant's counsel might as well have made an omnibus offer of all the books in the library of the Historical Society to prove the date when work was first commenced on the Oregon Central Railroad.

Although Ben Holladay acquired the title to the land in 1869, and it was subject to be assessed to him for the year 1870, it does not appear to have been assessed at all until for the year 1873, when by some unexplained circumstance it was included in the assessment of the property and lands of the Oregon and California Railroad Company. It was an error for the assessor to have assessed it to any person other than the record holder. (*Hill's Ann. Laws of Or.*, p. 1278). Whether Ben Holladay ever had notice of the fact that the land was assessed to the complainant of course does not appear. Since it was not assessed at all from the time he acquired the title in 1869 until 1873—four years—it may be inferred that he had no such notice. And it is reasonable to infer that he never had notice that the land was being assessed to the complainant. But this entire matter rests wholly in speculation, conjecture and surmise, and nothing whatever in the way of competent evidence is deducible from it. Under the law, the title standing of record in Ben Holladay, the land should have been assessed to him, as has been done since 1902; and under the law it was a mistake, and improper, for the

tax assessor to have assessed it to any one else, and there the matter rests.

The matter of taxes is not important, since, in our opinion, this suit must be determined on grounds as to which the assesment of the land or the payment of taxes upon it can have no relevancy; but conceding, arguendo, that complainant had paid the taxes upon it for the years it claims to have paid them, what inference can be drawn from that circumstance which would have a tendency, inductively, to create an equitable ownership of the land in complainant?

It would appear, in the first place, that the complainant had a large land grant—3,000,000 acres—that many lands were assessed to it, and by reason of Ben Holladay's known relation to complainant, and the association of his name with its affairs, it is not difficult to surmise how an assessor, acting upon an assumption, included this land in the lands assessed to the complainant.

But the assessment of the land to the railroad company, or the payment of any taxes by it, is now shown by any evidence, or by any circumstance, or inference, however remote, to have had any relation to the alleged lost document, or to any claim of title or ownership made by complainant. We call attention here to what we have shown in the statement of fact, (*ante p.*——), that no pretense of any ownership of the land by complainant is made, based upon any other fact or circumstance than the alleged lost document. There is no evidence that any one ever saw or

had possession of that document, and there is no trace of it anywhere among the records kept by complainant of documents of a similar nature, and where, if it had ever in fact existed, some trace of it would certainly be found.

And it appears from the evidence of C. W. Eberlein (Rec. p. 650 *et seq.*), that it was no unusual or extraordinary thing for complainant to have paid taxes on lands that it did not own. It paid taxes on many tracts of land that it did not own.

And the fact that complainant ceased paying taxes on the land,—if it ever did pay them,—in 1906, when the Land Company was set up as the owner of the land, without any conveyance or attempted conveyance to it of any title, *or any claim* of right of title to it, by complainant, is certainly an admission on complainant's part that any taxes theretofore paid by it was without reference to any claim of title, or of any right or interest it had in the land. There could be no clearer evidence of a party's interpretation of its own rights than this. Such conduct must be taken as an unequivocal recognition and admission by complainant of a better title and superior rights outstanding in some one else. It was an *abandonment* of any claim to the land which, under the authorities, clearly constituted an admission of a better outstanding title.

In *Williams vs. Mosely*, 110 Ga. 56; 35 S. E. 301, court say:

"There was testimony to the effect that, for many years prior to the institution of this suit, the plaintiff in error had abandoned the land, and it was absolutely unoccupied. * * * We think that such *abandonment by a party could be legally construed into an admission of a better outstanding title.*"

This is an established principle of law. See

Vickery vs. Benson, 26 Ga. 582;

Denham vs. Holman, 26 Ga. 191;

Tarver vs. Deppen, 132 Ga. 798; 65 S. E. 177; 24 L. R. A. (N. S.) 1161;

Sage vs. Rudnick, 67 Minn. 362; 69 N. W. 1096;

Todd vs. Weed, 84 Minn. 4; 86 N. W. 756;

Meier vs. Meier, 105 Mo. 411; 16 S. W. 223;

Neil vs. McElhenny, 69 Pa. St. 300;

Williams vs. Rand, 9 Tex. Civ. Ap. 631; 30 S. W. 509.

And further than this, the complainant, if it paid any taxes on the land, knew that the title to the land was of record in Ben Holladay during all the years it was assessed to complainant, and if it paid the taxes, it must have had that fact brought to its attention every year, and still it never, during all the seventeen years of Ben Holladay's life after it now pretends it acquired an equity in the land, asked him to transfer the legal title to it; and it has never sought, during all

these forty and more years to establish and enforce its equitable rights in the courts,—although there was absolutely no impediment in the way of its having done so, if it believed it had an equity. It preferred rather to abandon its claims to a dummy corporation and to attempt to have the latter gain a title by adverse possession.

Payment of taxes creates no right, either in equity or in law. It may be shown as evidence of a claim of ownership, but nothing more.

In *Parker vs. Daley* (Or.) 115 Pac. 723, the court say:

“Plaintiff urges that the failure of defendant to pay the taxes on the land after he acquired the title thereto, and the payment thereof by plaintiff (probably assessed to plaintiff), is a sufficient showing of negligence or at least acquiescence by the defendant in plaintiff’s possession of the property and the expenditure of money thereon to constitute bad faith toward plaintiff, but this contention is without merit.

Whether the tax for the year 1896 and subsequent years was levied against plaintiff or defendant, the payment thereof by plaintiff was a voluntary payment, which imposed no obligation or liability upon defendant, and could not create a right in plaintiff’s favor. ‘No man can make another debtor against his will; as if a man pay my debt without my request, I am not bound

to repay him." (Citing numerous Oregon decisions.)

We believe that upon the facts shown, the principles of law stated, and the authorities referred to, there is abundant support for the decision of the learned judge before whom the cause was heard in the District Court. And when a thing is true for one reason, it is true for every reason. But if the soundness of that decision, as based upon the matters hereinbefore discussed, could for any reason be questioned, there are, as suggested in the opinion filed, numerous other reasons why the defendant's clear title of record is impregnable against the claims preferred, and the attack sought to be made upon it, by complainant, in this suit.

PART II.

THE ALLEGED LOST INSTRUMENT COULD NOT BE ADMITTED IN EVIDENCE AS A DEED OR CONVEYANCE, BECAUSE NOT STAMPED AS REQUIRED BY LAW.

If the document pleaded had been intended as a conveyance of real property, notwithstanding its informality and executorial defects, it would have been subject to the stamp duty imposed by section 151 and Schedule B, of Act of Congress of June 30, 1864 (13 Stat. 291, 299):

"Conveyance.—Deed, instrument, or writing,

whereby any lands sold shall be granted, assigned, transferred or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons by his, her, or their direction, when the consideration or value does not exceed five hundred dollars, *fifty cents*. When the consideration exceeds five hundred dollars, and does not exceed one thousand dollars, *one dollar*. And for every additional five hundred dollars, or fractional part thereof, in excess of one thousand dollars, *fifty cents*."

And if not properly stamped according to said Schedule B, it is expressly denounced as inadmissible in evidence in any court by section 163 of said Act of June 30, 1864, as amended by section 9 of Act of Congress of July 13, 1866 (14 Stat. 143). The latter is as follows:

"That section 163 be amended by striking out all after the enacting clause and inserting in lieu thereof the following: That hereafter no deed, instrument, document, writing, or paper, required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded, or admitted or used as evidence in any court, until a legal stamp, or stamps, denoting the amount of tax, shall have been affixed thereto, as prescribed by law."

Section 158 of Act of June 30, 1864, as amended by section 9 of Act of July 13, 1866, provides under

what circumstances and in what manner a deed, or other document required by law to be stamped, which did not have affixed to it the stamp required by law thereon at the time of making or issuing the said instrument, may be subsequently stamped by any party having an interest therein.

The aforesaid acts were repealed by section 36 of Act of Cong. of June 6, 1872, (17 Stat. 256); and by a saving clause in section 46 of said repealing act the penalties, forfeitures, etc., are retained and kept in effect.

By Act of Congress on June 23, 1874 (18 Stat. 250), the time within which unstamped documents might be stamped and saved from the penalties and forfeitures, under the internal revenue laws repealed, was extended to January 1, 1876.

By Act of Congress of February 25, 1876 (19 Stat. 5), the act of June 23, 1874, was extended in its effect to January 1, 1877.

There was no further legislation on the subject, and documents, therefore, which were not stamped when issued, or thereafter, pursuant to the enabling, repealing, or extending acts, and the notice given thereby, remain subject to all the penalties, forfeitures, and disabilities imposed by the internal revenue laws in force at the time such documents were made, signed, or issued.

It has never been questioned but that the statutes referred to are binding upon the federal courts. In-

deed, the federal courts have uniformly recognized their binding effect, and when applicable have rigorously enforced them.

Campbell vs. Wilcox, 10 Wall. 421;

Wheaton vs. Weston Co., 128 Fed. 151;

Sackett vs. McCaffrey, 131 Fed. 219;

Barry vs. Law, 89 Fed. 582;

Frank Waterhouse vs. Rock Island, 97 Fed. 466;

U. S. vs. Chamberlain, 219 U. S. 250.

In *Sackett vs. McCaffrey*, *supra*, this court said:

“The defendants in error refer to a number of cases wherein state courts have held that Congress has no power to prescribe rules of evidence for state courts, and that the provisions of the stamp act in this respect are not intended to govern such tribunals. Without discussing the correctness of these decisions, it is sufficient to say that they have no application to federal courts, where the laws of Congress prescribing rules of evidence must be observed, unless open to some constitutional objection, which has not been suggested with respect to this statute.”

The document pleaded in the bill purports to have had affixed to it and cancelled a *five cent stamp*, which would have been sufficient for a bill of sale of personal property, or other simple contract.

“Whatever upon its face an instrument purports to be, that it is, for the purpose of ascertaining the stamp duty.”

U. S. vs. Isham, 84 U. S. 507.

“A court of equity cannot, any more than a court of law, receive evidence of the contents of a written agreement, which appears never to have been stamped. * * *

The stamp act was passed for the protection of the revenue, and it expressly provides that the instrument shall not be proved in evidence unless properly stamped. I have no power, under any circumstances, to dispense with that condition.”

Smith vs. Henley, 1 Phillips (Eng.) 390;

See also

Disbrow vs. Johnson, 18 N. J. Eq. 36.

“Equity will not give a remedy in direct contravention of a positive rule of law.

Bispham's Prin. of Eq., 37;

Storey's Eq. Jur., 12.

When the statutes of the United States make special provision as to the competency or admissibility of testimony, they must be followed in the courts of the United States, and not the laws

or the practice of the state in which the court is held when they are different."

Whitford vs. Clark, 119 U. S. 522;

Ex parte Fisk, 113 U. S. 721;

Railway Company vs. Pinkney, 149 U. S. 206;

Booth vs. Denike, 65 Fed. 46;

Allnut vs. Lankaster, 76 Fed. 130;

The insufficient stamping of the alleged lost instrument has another important bearing upon the issues in this case besides furnishing ground for a technical objection, as will be pointed out hereafter.

THE LAND WAS NOT THE PARTNERSHIP PROPERTY OF THE FIRM OF BEN HOL- LADAY & CO.

Complainant has, of course, made no pretense of claiming that the alleged lost agreement would, or could, if established, contemplate a transfer of any other than the *partnership* property of the firm of Ben Holladay & Co. It does not claim that it would concern the individual property of *Ben Holladay*; and it is plain and obvious from the face of the instrument that it would not. Before such instrument could be held to pass the title to, or any interest in, the land in question to the Oregon Central R. R. Co., it would be incumbent upon complainant to prove that it was the *partnership* property of the firm of Ben Holladay

& Co. This would be an essential link in the chain of title,—as much so as would be the conveyances from Grindley and Elliott to the copartnership.

Complainant has made no attempt to prove that the land was partnership property, but has apparently relied upon the court assuming that it was, from the single circumstance that the firm name was inserted in the deeds from Grindley and Elliott. Such an assumption of fact could, of course, only proceed upon the theory that there was engrafted upon those deeds an *express trust* in favor of the members of the copartnership whose names did not appear in the firm name, and hence not in the deed, and that such a trust is manifested by the use of the words "& Co.", following the individual name, Ben Holladay.

Where property is deeded to a firm name, as in this case, the settled rule governing the vesting of title, and which has the sanction and approval of all authority upon the subject, has, we believe, been correctly stated in

Percival vs. Platt, 36 Ark. 464:

"A partnership, as such, cannot, at law, be the grantee in a deed, or hold real estate. The legal title must vest in some *person*, and a partnership is not a corporation. If the title be made to all the partners by name, they hold the legal title as tenants in common, without survivorship. If to one partner alone, the whole legal title vests in him, which is the case, also, where the title

is to a partnership name, which, as in this case, expresses the name of one party only, with the addition of "& Co."

See also:

- Winter vs. Stock*, 29 Cal. 407;
Riddle vs. Whitehill, 135 U. S. 621;
Ketchum vs. Barber, 12 Pac. (Cal.) 221;
Rixford vs. Ziegler, 150 Cal. 435; 88 Pac.
 1092;
Gille vs. Hunt, 35 Minn. 357;
Arthur vs. Weston, 22 Mo. 378;
Close vs. O'Brien, 135 Iowa 305; 112 N. W.
 800;
Adams vs. Church, 42 Or. 272; 70 Pac. 1037;
Dodson vs. Dodson, 26 Or. 349; 37 Pac. 542;
13 Cyc. of Law & Pro., p. 624.

It requires but little argument to demonstrate how fallacious would be an attempt to engraft an express trust upon the conveyances from Grindley and Elliott to Ben Holaday, based simply upon the presence of the words "& Co." following his name. It is apparent that recourse would have to be had to parol evidence to ascertain whether any person, and if so, who, was meant by those words; and then their interest, and the conditions of the trust, would have to be sought out in the same manner.

"In a state where there is no statute prohibiting the use of a name or an abbreviation to do

business under, other than that of the individual, as in this state, there is no necessary presumption that when ‘& Co.’ is made use of after the dealer’s name, he has a partner, or partners, or that such title includes more than one person.”

Brennan vs. Partridge, 67 Mich. 449; 35 N. W. 85;

Munton vs. Rutherford, 121 Mich. 418; 80 N. W. 112;

Robinson vs. McGarrity, 28 Ill. 423;

Schroeder vs. Turner, 68 Md. 509.

The essential thing about an express trust is that it shall be positive, direct, and certain, with reference to the trustor, the trustee, the *cestui qui trust*, the subject matter, and the conditions of the trust.

39 *Cyc. of Law & Pro.*, 24, 34;

Russell vs. Peyton, 4 Brad. (Ill. Ap.) 478.

“The certainty in a declaration of trust which is necessary and sufficient to create a trust has been construed to mean clear, explicit, definite, and unequivocal expressions, setting out the trust with such certainty that a court of equity may enforce its execution. * * * The rule requiring certainty is most frequently applied to the naming of the beneficiary, and the interest which he is to take, or the proportion, in case there are several.

39 *Cyc. of Law & Pro.*, p. 58.

“An express or direct trust is usually created by an instrument in writing, which specifies distinctly the person, property, and purposes of the trust. In such case an intention to create the trust must appear upon the face of the instrument.”

Skeen vs. Marriott, 22 Utah 73; 61 Pac. 299.

And where, as in Oregon, there is a statute of frauds governing its creation, an express trust involving the title to real property cannot be created or proved by parol—although an implied, or resultant, trust, of course, may be.

Perry on Trusts (5th ed.) sec. 75, 79.

“Every grant or assignment of any existing trust in lands, goods, or things in action, unless the same shall be in writing, subscribed by the party making the same, or by his agent lawfully authorized, shall be void.

Lord's Oregon Laws, sec. 7398.

“No estate or interest in real property, other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, transferring, or declaring the same, or by his lawful agent under written au-

thority, and executed with such formalities as are required by law." (Enacted 1862.)

Lord's Oregon Laws, sec. 804.

"Trusts are divided by our ablest writers on the subject into express and implied. Those created by the express words of the grantor or settlor, pointing out the property, persons, and purposes of the trust, are termed 'express trusts,' * * * All other trusts are created by implication or presumption of law, and are termed 'implied trusts.' This class embraces what is known as 'resulting trusts,' and 'presumptive trusts.'

Kaphan vs. Toney (Tenn. Ch. App.), 58 S. W. 909;

39 Cyc. of Law & Pro., p. 24.

"Oral proof cannot be heard to engraft an express trust upon a conveyance absolute in its terms."

Perry on Trusts (5th ed.), sec. 76.

The words "& Co." following the individual name of the grantee in whom the title vests, do not impart notice upon the record of any latent or subjective equities; and the individual grantee so designated can convey a complete and perfect legal title.

Winter vs. Stock, 29 Cal. 407;

Arthur vs. Weston, 22 Mo. 378;

Rixford vs. Zeigler, 150 Cal. 435;
Riffle vs. Ozark Land Co., 81 Mo Ap. 177;
Dodson vs. Dodson, 26 Or. 349;
Parker vs. Bowles, 57 N. H. 491;
Collner vs. Greig, 137 Pa. St. 606;
Wariner vs. Mitchell, 128 Pa. St. 153;
Ketchum vs. Barber, 12 Pac. (Cal.) 251;
Barnett vs. Lachman, 12 Nev. 361.

This of course excludes any possible theory of an express trust being superinduced upon the conveyances from Grindley and Elliott to Ben Holladay—" & Co." And there can be no presumption of an equitable ownership inconsistent with the legal title which so vested in and was held by Ben Holladay. It can only be shown by affirmative proof that the ownership does not accord with the legal title, and the burden of proof is upon the party alleging an ownership inconsistent with the legal title.

30 Cyc. of Law & Pro., p. 436, and cases cited.

Barnett vs. Lachman, 12 Nev. 361;
Hardin vs. Dolge, 61 N. Y. S. 754;
Holge vs. Lowe, 12 Nev. 286.

If the land here involved was partnership property, and if Ben Holladay held the legal title which vested in him by the conveyances from Grindley and Elliott in trust for himself and his copartners, and subject to the liabilities of the firm, the trust so existing was an implied, or *resulting* trust, rather than an express

trust. And if such a trust was created it might have entailed a beneficial ownership in the copartners as tenants in common, independently of partnership interest; or, an equitable ownership in the co-partnership, if the land was in fact partnership property, and subject to the rights of creditors. The question which might have arisen between other members of the firm and Ben Holladay, as to whether there was a trust relation, would be quite different from any question which could arise in this suit because of the appellant company claiming that the land was partnership property of the firm. Ben Holladay might have been a trustee of a resulting trust, holding the legal title to the land for the benefit of the other co-partners, and still the land would not necessarily have been partnership property.

Whether or not the land was partnership property, the legal title of which was held in trust by Ben Holladay for the co-partnership, depends upon other conditions than whether the other co-partners contributed any part of the purchase price.

“The general rule is undoubtedly this: Real estate purchased for partnership purposes, and appropriated to those purposes, paid for by partnership funds, and necessary for partnership purposes, always becomes partnership property.

* * * The three elements above stated must unite, in order to make the real estate necessarily partnership property.’ * * * There must be a disposition, conveyance, or transfer

of the legal estate, and a consideration paid by the beneficiary. And yet another element is necessary to impress the realty with these characteristics. It must be appropriated to the purposes of the partnership."

Dodson vs. Dodson, 26 Or. 349.

Of course we are not concerned in this case about whether the other members of the firm of Ben Holladay & Co. had any beneficial interest in the land independently of their partnership interest in it, if it were partnership property. There is nothing in the case to suggest that they had. But whatever trust relation Ben Holladay may have stood in with reference to the title to the land, either as to the partnership, considering it as partnership property, or as to the other co-partners, considering their interests in it as independent of the partnership, such a trust was necessarily a *resulting* trust. The sole question here is, was this land partnership property, the legal title of which was held by Ben Holladay in trust for the benefit of the *partnership*, and subject to the rights of creditors to have it declared personalty, in equity, for the purpose of paying partnership debts. The answer to this question cannot be found in a presumption, but it must be sought for in affirmative evidence showing conditions which would create a resulting trust; and those conditions are clearly stated in the decision last above quoted. Proof that the land was conveyed to the partnership name furnishes neither

evidence, nor ground for legal inference, that it thereby became partnership property.

While use of a partnership name in transactions involving personal property creates a presumption that the transaction is a partnership one, no such presumption can arise from the use of the firm name in the purchase or sale of real estate.

22 *Am. & Eng. Encyc. of Law*, p. 79,93;
15 *Ib.*, p. 1150-1154.

“One of the usual elements of a partnership consists in clothing each partner with full power to buy and sell the partnership property. A perfected sale implies that which alone in real estate transactions can make the sale effective—a conveyance. * * * Hence, from the nature of the property, the limitations of the agency of each partner in making a perfected sale, courts are not inclined to imply a partnership where the subject matter is real estate.”

Farr vs. Gleason, 56 Vt. 633.

The law governing this question is very aptly expressed in a brief of Hon. W. C. Van Fleet, who was counsel in the case of

Hogle vs. Lowe, 12 Nev. 286.

“The real estate of a partnership must be purchased with partnership funds to make it partnership property. (*Pugh vs. Curry*, 5 Ala. 446;

Owens vs. Collins, 23 Ala. 837; *Matlock vs. Matlock*, 5 Ind. 403; *Patterson vs. Blake*, 12 Ind. 436). If there is no proof that it was purchased with partnership funds, it will be presumed to be held by the parties as tenants in common, or joint tenants. (*Thompson vs. Bauman*, 6 Wall. 316.)

If not paid for by partnership funds then it is his property who pays for it, whatever use he permits to be made of it. (*Marvin vs. Collins*, 23 Ala. 837; 4 *Mumf. R.* 316; 7 *S. & R.* 438)."

Opinion. "When property is purchased with partnership funds for partnership purposes, and appropriated to partnership uses, no further proofs should be, and certainly none are, required to establish the evident intention and agreement of the partners. In such case every act impresses upon the property the character of personality. But the mere fact that real estate held by members of the firm as tenants in common is used by the partners in the partnership business for partnership purposes, or an agreement to so use it, is not of itself sufficient to convert it into partnership stock; there must be some evidence of further agreement to make it partnership property. (Vol. 1 *Am. Lead Cas.*, 496). At law real property used by a partnership is deemed to belong to the person in whose name the title by conveyance stands; and it is so considered in equity, until it is shown to be partnership prop-

erty, either by evidence establishing a proper agreement, or by proof of purchase with partnership funds for partnership purposes.”

See also:

Schaeffer vs. Blair, 149 U. S. 258;

Peper vs. Pepper, 24 Ill. Ap. 316;

Rice vs. Pennypacker, 5 Del. Ch. 33-37;

City of Providence vs. Bullock, 14 R. I. 353;

Harris vs. DeRaismes, 38 Atl. (N. J. Eq.) 639;

Whitcomb vs. Whitcomb, 81 Atl. 97;

Taylor vs. McLaughlin, 120 Ga. 703; 48 S. E. 203.

There can be no question about the full legal title to the land having vested in Ben Holladay by the conveyances to “Ben Holliday & Co.” and it would be a *reductio ad absurdum* to say that a legal title held under an instrument of conveyance which did not express or declare a trust, would yet be subject to a trust provable simply by the face of the instrument. And when the authorities hold, as they do, that Ben Holladay, holding the title under a conveyance to “Ben Holladay & Co.”, could convey a complete and perfect legal title, and that the words “& Co.” following his name would not impart notice upon the record of any equities, or ownership, inconsistent with the legal title vested in him, they necessarily hold, clearly and squarely, that those words, of themselves, do not mean or prove anything.

Winter vs. Stock, 29 Cal. 408;
Ketchum vs. Barber, 12 Pac. 251;
 and cases cited *supra*.

Whether or not the title to this land was vested in Ben Holladay as the trustee of a *resultant* trust, in favor of the co-partnership, is a question of fact, dependent primarily and vitally upon proof that the land was purchased and paid for with partnership funds.

15 *Am. & Eng. Encyc. of Law.*, p. 1150.

"It is indispensable to the establishment of a trust that payment of the purchase price should actually be made by the person asserting the trust."

Pomeroy's Eq. Jur., sec. 1037, 1040.

"It may be stated, also, as a settled principle of law, that in order to establish a resulting trust, the evidence must be strong, clear, convincing and indubitable, touching the fact of payment by the alleged beneficiary, or for or in his behalf."

Barger vs. Barger, 30 Or. 268; 35 Pac. 846.

See also:

De Roboam vs. Schmidlin, 50 Or. 388;
Snider vs. Johnson, 25 Or. 328;
Rice vs. Pennypacker, 5 Del. Ch. 33;
Woodside vs. Hewell, 109 Cal. 481;

Van Buskirk vs. Van Buskirk, 148 Ill. 9; 35 N. E. 383;

Gunnison vs. Erie, etc., 157 Pa. St. 103; 27 Atl. 747;

Howland vs. Blake, 97 U. S. 624; 24 L. ed. 1027;

Brickell vs. Early, 115 Pa. St. 473;

Perry on Trusts (5th ed.), sec. 137.

The complainant has made no pretense of proving that the purchase price for the land was paid by partnership funds. This alone is sufficient, under the authorities, to countervail any claim complainant could make that the land was partnership property; or that any right, title, or interest in it could have been transferred or conveyed by the alleged lost document, if that were established and could be construed as capable of passing the title to, or any interest in, real property. But beyond this, the evidence shows conclusively that the land not only *was not*, but that it *could not* have been purchased for the use of the co-partnership, because, as clearly appears by complainant's bill and from the evidence, the only use the partnership could have had for it would have been to obtain the timber growing upon it, and to acquire a site for a saw mill to manufacture the timber for use in the construction of the "first twenty miles" of the railroad owned by the Oregon General Railroad Company; and the firm had purchased, acquired and owned all of the fir timber, and the right to erect a mill upon the land, and had erected a mill

upon, and had removed a great part of the timber from the land, at the time both tracts were purchased by and deeded to Ben Holladay, by the name "Ben Holladay & Co."

Taylor vs. McLoughlin, 120 Ga. 703; 48 S. E. 203.

It appears by the court files and records in the suit of *Holladay vs. Elliott*, introduced by complainant, that that suit was commenced November 5, 1869, for an accounting and dissolution of the copartnership of Ben Holladay & Co., and that it was never claimed by or on behalf of any member of that firm, or by any party to that suit, that this land was partnership property. *On the contrary, Ben Holladay testified clearly in that suit that it was not.*

The title to the land stood of record in the name Ben Holladay & Co. at the time that suit was commenced, the Elliott tract having been deeded just a month previous. The alleged transaction upon which complainant bases its claim was not had until March 28, 1870,—five months after the commencement of the suit. The title stood of record in Ben Holladay during all the pendency of that suit, and it nowhere appears in any phase of that litigation that any claim was ever made by any one connected with it that this land was partnership property. The only allusion, directly or indirectly, made to it in that suit, was the testimony of Ben Holladay in his deposition given April 3, 1871:

“Int. 22—State fully all the property owned by the firm of Ben Holladay & Co. *at the date of the commencement of this suit, and its value?*”

Ans.—* * * Aside from these contracts the firm of Ben Holladay & Company had nothing except two saw mills and a small machine shop; also some personal property, consisting of shovels, picks, cattle, etc., the exact value of which I do not know.” (Com. Ex. 46; Rec. p.—).

This testimony clearly negatives any theory that the land was regarded by Ben Holladay as partnership property; and, in view of the evidence referred to above, it is difficult to perceive how a fact could be established more clearly and satisfactorily than the fact is established in this case that the land was not partnership property.

It would naturally create wonder in the mind of lawyer or layman, in view of the character and business ability of the parties, their presumtively intimate knowledge of both the facts and the law connected with the transactions occurring at the time it is alleged the document pleaded in the bill was made, and which would have been cognate and correlative with the making of that document, and if it was intended thereby to convey the land here in question, why it was not drawn as a deed, and properly executed and stamped as such. The deed from the Oregon Central Railroad Company to the complainant company (ex. 26), made at the same time, in which both the

parties named as grantor and grantee in the alleged lost document were interested, and in making which they actively participated, was drawn with such meticulous care as only a capable lawyer would have drawn it, and was executed with all the formalities required by law, including the affixing and cancellation of *eight hundred dollars* in revenue stamps. It will not do to say that the parties to the alleged lost instrument intended that it should operate as a conveyance of this land, but omitted to draw it in such form, or to so execute or stamp it, as to give it that effect, or make it capable of recordation, or of being used as evidence in any court, merely through ignorance, inadvertence, or mistake. There was a reason why, if the document was ever made, it was not drawn, or executed, or stamped as a deed, and the reason is found in the fact that the land was not, and never was considered by any one as the partnership property of Ben Holladay & Co., and it was never even thought of as being in any wise conveyed to the Oregon Central R. R. Co. And if complainant ever believed otherwise, it had seventeen years during which Ben Holladay lived, and many years more during which witnesses lived, and who are now dead, to have ascertained and established the truth.

Davis vs. Judson, 159 Cal. 121; 113 Pac. 150.

In *Thornton vs. Krimble*, 28 Or. 274, the court say:

“There is no evidence of plaintiff’s intention to

sign the contract, or of Krimble's intention to sign the bond; and, for all that appears, he may never have intended to sign it, and, if so, the absence of his signature would not be in consequence of any mistake on his part."

In *Smith vs. Smith*, 51 Or. 31, the court say:

"He does not claim, however, that his father, whom the record shows to have been a man of large business experience, did not understand the proper manner of executing deeds conveying real property, and it is hardly probable that he would have executed an instrument intending to convey his home place to his son, without having it witnessed and acknowledged."

THE ALLEGED LOST INSTRUMENT, IF IT WERE ESTABLISHED, AND IF IT COULD BE CONSTRUED TO BE A DEED, WOULD BE VOID FOR WANT OF CONSIDERATION SO FAR AS IT MIGHT CONCERN THE TITLE TO THE LAND INVOLVED IN THIS SUIT.

There is no evidence that the complainant company or the Oregon Central Railroad Company, ever paid anything for the land; and there is no consideration, valuable or otherwise, recited or shown upon the face of the alleged lost document for a transfer or conveyance of it to the latter company. This is not a

theory; it is a *condition* apparent from the alleged instrument, the allegations of complainant's bill, and the evidence it has introduced.

It should be borne clearly in mind (and it is established by evidence which is uncontradicted and conclusive—complainant's own evidence) that on *November 19, 1868*, the firm of Ben Holladay & Co. purchased, paid for, acquired, and owned all of the fir timber and the right to mill sites upon the land; and that thereafter the Elliott tract was deeded to Ben Holladay, by the name "Ben Holladay & Co.", October 5, 1869—nearly a year after the purchase of the timber by the firm, and about a month and a half before the timber was entirely cut and removed, and the first twenty miles of the railroad was completed (December 24, 1869); and the Grindley tract was so deeded May 4, 1869—six months after the firm had purchased the timber and the right to a mill site upon the land.

And the foregoing facts must be so borne in mind in the light of the allegations of complainant's bill that Ben Holladay & Co. purchased this land,

"to enable the said Ben Holladay & Co. to further *carry out the said contract* with the said Oregon Central Railroad Company for the construction of the said twenty miles of railroad. *
* * *and to acquire a site for a saw mill and timber from which ties and bridge timbers could be manufactured to enable them to perform their said contract,*" etc.

The alleged document recites at its commencement:

"That we, the undersigned, Ben Holladay & Co. of Portland, Oregon, in consideration of the cancellation this date by the Oregon Central Railroad Company at Salem, Oregon, of all certain contracts in writing heretofore existing between said company and the undersigned, in relation to the construction of a railroad and telegraph line * * * *AND THE AGREEMENT OF SUCH COMPANY TO PAY THE UNDERSIGNED FOR ALL MONEYS PAID OUT, EXPENDED AND INCURRED UNDER SUCH CONTRACTS*, to wit: an amount not less than eight hundred thousand dollars in U. S. Gold Coin. *It being a part of the arrangement that all of the property hereinafter specified should be delivered and transferred to said company; * * ** and in consideration of the full sum of one dollar to us in hand paid * * * *have sold, assigned, set over, transferred, delivered and conveyed,*" etc.

a lot of particularly described personal property.

Whatever might be said of, or claimed for, the instrument in relation to its character and office, it would certainly be an instrument of *bargain and sale*. Of *bargain and sale* of the *personal* property "*specified*" and described in it, as we contend. But whatever property might be comprehended by it, by any sort of construction which might be given it, it would

express a *bargain and sale* transaction. If by any possibility it could be held to be a deed, it would necessarily have to be held a deed of *bargain and sale*.

The instrument purports to express a valuable consideration, — *A MONEY CONSIDERATION*, — viz: "*THE AGREEMENT OF SUCH COMPANY TO PAY THE UNDERSIGNED FOR ALL MONEYS PAID OUT, EXPENDED AND INCURRED UNDER SUCH CONTRACTS,*" for whatever property would be conveyed, or be intended, by it. And it contains the word "sold" in the granting clause.

The obvious meaning of what is so recited in the preamble of the instrument is that the contract relations existing between Ben Holladay & Co. and the railroad company were abandoned by mutual consent, the contracts rescinded and cancelled, and Ben Holladay & Co. were to be reimbursed for what it had cost them in performing the contracts to build the railroad up to that time, which would, of course, embrace materials and equipment on hand, but not used. The reimbursement would include the cost of all construction equipment and materials which Ben Holladay & Co., had purchased for the purpose of performing said contracts, and which they had on hand at the time the contracts were abandoned and cancelled. And in consideration of the railroad company's agreement "to pay the undersigned for all moneys paid out, expended and incurred *under said contracts,*" Ben Holladay & Co., "*as a part of the arrangement,*"

were to "transfer and deliver" "*all of the property hereinafter specified*" to said railroad company.

The property so to be "*transferred and delivered*" is then "*specified*" in the granting clause; and a further consideration of "one dollar" is expressed for the sale, assignment, etc., of the property so specified.

The consideration of one dollar so expressed is, of course, merely formal and secondary. The real consideration for any and all property conveyed or intended to be conveyed is "*the agreement of such company to pay the undersigned for all moneys paid out, expended and incurred under said contracts.*" The recital of the consideration of one dollar was only to give present effect to the "*transfer and delivery*" of the property specified and which it was previously recited, as "a part of the arrangement "should be delivered and transferred to said company." The consideration of one dollar so recited could by no possibility of reasonable construction be extended to apply to any other or different property than what is so "specified" or contemplated in "the arrangement."

The words "and all leases and all property of every name and nature now owned by us," etc., *following* as they do the description of specific personal property and then *followed* by a further specific designation of the *specified* personal property, described as "the same being," etc., (and also in the light of the expressed consideration) makes those words so clearly *ejusdem generis* in their meaning that there can be no

doubt but that they relate and apply to personal property.

Johnson vs. Goss, 128 Mass. 433;

Benton vs. Benton, 63 N. H. 289.

We are aware that the rule of *ejusdem generis* is not one of hard and fast application, but that it is subordinate to the real intent when that is clearly shown; but in the present case, the facts and circumstances disclosed by what is expressed in the alleged instrument itself, and by the evidence, clearly require its application, as we will demonstrate presently.

Whatever character or office might be ascribed to the alleged instrument otherwise, it is clear that, if it were a deed, its nature as a deed of either bargain and sale, of release, as a covenant to stand seized, or as a common law conveyance, is to be determined by the consideration expressed as "*the agreement of such company to pay the undersigned for all moneys paid out, expended and incurred under such contracts.*"

The consideration of one dollar afterwards recited is necessarily subordinate to, and is embraced and included in this. Following the cardinal rule of construction adopted by modern courts, that the intention of the parties must be sought out, if that is possible, and given effect, this proposition cannot be disputed.

"In construing a deed the object sought is to ascertain and give effect to the intention of the parties.

The court, however, seeks only to translate the instrument before it, not to create a new and different one. Accordingly, the intention sought is only that expressed in the deed, and not some secret, unexpressed intention, even though the latter be that actually in mind at the time of execution. This is the fundamental rule of al judicial interpretation."

Citing *Co-op. Bldg Bk. vs. Hawkins*, 30 R. I. 171; 73 Atl. 617; *Hoyt vs. Ketchum*, 54 Com. 60; ,5 Atl. 606; 17 *Am. & Eng. Encyc. of Law*, 2, 3.)

Gedes vs. Pawtucket Inst., 80 Atl. (R. I.) 415

It would, furthermore, be in consonance with the well known canon of construction that what is first stated in a deed controls any matter subsequently stated which is repugnant, or inconsistent, or irreconcilable to or with what is first stated.

"If two clauses in a deed are entirely inconsistent and irreconcilable with each other, the latter must give way to the former. (*Petty vs. Booth*, 19 Ala. 633; *McWilliams vs. Rumsey*, 23 Ala. 813; *Webb vs. Webb*, 29 Ala. 588.) But, if the words of the latter clause are of doubtful import, they will not be so construed as to contradict the words of a preceding clause."

Head vs. Hunnicutt, 55 So (Ala.) 161;

Dickson vs. Wildman, 175 Fed. 580.

And the words, "the agreement of such company to pay," etc., not only express the consideration, and the only consideration, for any property purposed or contemplated by the parties to be conveyed, but it also expressly defines and limits the property for which the consideration is given,—property for which Ben Holladay & Co. had "paid out, expended and incurred" moneys or liabilities "*under said contracts.*"

Thus we have a valuable consideration—a money consideration,—and the property for which it is given clearly expressed; and there can be no other consideration implied or thought of. If any real property were intended to be conveyed by the explanatory clause following the granting clause, it cannot be implied or presumed from the instrument that there was any other or different consideration for it than what is so expressed in the commencement of the document, "The agreement of such company to pay," etc. If any property could be conveyed by the explanatory clause it would have to be by relation to and by force of the consideration first expressed and the granting clause. It surely could not be contended that the explanatory clause could, standing alone and independently of the prior parts of the instrument, operate to convey the title to real property. And in this connection it is to be noted that the alleged instrument is not under seal, and is not executed with the formalities necessary to create a presumption of a consideration in a common law deed; and is not stamped as required by law.

But the intention of the parties being clearly expressed, and the consideration contemplated and intended by the parties being also clearly stated, and followed by the words "*sold*" and "*sell*," there is no reason for any presumption or implication of any other consideration. The recital of this consideration and its plain application to the property to which it is also unequivocally expressed that it was intended to apply, precludes any other implied consideration, or the presumption of any intention to have it apply to any other property than property purchased by Ben Holaday & Co. "*under said contracts.*" The familiar maxim *expressio unius est exclusio alterius* is apposite. Or, more properly, perhaps, the maxim *expressum facit cessare tacitum*. "Where there is an express promise the law does not raise an implied one in reference to the same matter."

2 Steph. Com., 112.

"The law never implies a promise where there is an express promise."

Planing Mill Co. vs. Brundage, 25 Mo. Ap. 271;

Whiting vs. Sullivan, 7 Mass. 173;

Suits vs. Taylor, 20 Mo. Ap. 166.

The instrument, therefore, in any aspect of it, and with reference to any property contemplated or intended to be conveyed by it, is one of bargain and sale.

"By the usage and practice of the state, bar-

gains and sales, as a mode of passing estates, have nearly superseded all other modes of conveyance, and we do not believe it was at all designed, in the execution of the deed under consideration, to deviate from this accustomed mode. Nothing could more unequivocally impress a distinctive character on the instrument, than the words which have been used: the terms 'bargained and sold' follow the words 'given and granted,' and qualify the mode of the gift and grant, and show that it was a bargain and sale; and it is said that the words 'bargain and sale' in conveyances of lease and release, were inserted among the operative words of this conveyance, that the lease might be treated as a bargain and sale, and not a lease at the common law. (*Cornish on Uses*, 74.) Other considerations might be adduced from the limitations of the deed, conducing to the same conclusion, that this is a deed of bargain and sale; but it is perhaps unnecessary to advert to them, as the above view strikes us as satisfactory."

Matthew vs. Ward, 10 G. & J. (Md.) 448.

"The deeds of trust express a money consideration, and profess to be made thereon, though the amounts are merely nominal. The deeds therefore, containing appropriate terms, are to be treated as deeds of bargain and sale."

Brown vs. Renshaw, 57 Md. 67.

"The term 'bargain and sale' was used at com-

mon law to evidence a contract to convey and which became operative by the statute of uses. But the meaning of these words has become modified in the United States so that they are sufficient to convey the full fee simple title to any species of property."

Devlin on Real Estate, Sec. 22;

Richardson vs. Levi, 67 Texas 359; 3 S. W. 444.

The instrument in the case at bar does not contain the word "bargain," but it does contain the words "sold" and "sell." This, in our opinion, detracts nothing from its character as a bargain and sale instrument, but only militates against its being construed as a deed at all. If it had been intended as a deed, in all probability, and under the circumstances of its execution, it would have contained the usual apt and appropriate words generally inserted in conveyances of real property.

If by any known canon or possible theory of construction the alleged instrument could be read and construed as a deed, then beyond any question it would have to be construed as a deed of *bargain and sale*. As such it would require a valuable consideration to support it with reference to any property which it was contemplated or intended should pass by it. This is elementary.

"Deeds of bargain and sale and of lease and

release require a valuable consideration to support them."

6 Am. & Eng. Encyc of Law, p. 683;

9 Am. & Eng. Encyc. of Law, p. 102;

Washburn on Real Prop., Sec. 2273;

Devlin on Real Estate, Sec. 810;

Lambert vs. Smith, 9 Or. 185;

Austin vs. Felton, 41 Fed. 161.

It is perfectly plain from the language of the alleged instrument what was intended to be given in the way of a consideration, and what property the consideration was given for. It is so plain that there is no room for construction. The contracts were abandoned, and in consideration of

"the agreement of such company (the railroad company) to pay the undersigned for all moneys paid out, expended and incurred under such contracts."

"It being a part of the arrangement that all of the property hereinafter *specified* should be transferred and delivered."

Ben Holladay & Co. were to transfer the property so *specified*, and that would be clearly be done. Ben Holladay & Co. were to be reimbursed for what moneys they had paid out, expended and incurred liability for the performance up to that time of the contracts to build the railroad. That included all labor paid for, and materials purchased, which had gone into the con-

struction of the railroad to the extent to which it was already constructed; and also such construction equipment and materials as they had purchased for the purpose of performing said contracts, but which had not then been used for that purpose, and which they then had on hand. This later property was, by the terms of the instrument, purchased by the railroad company from Ben Holladay & Co., and agreed to be paid for, as above stated. It consisted of the property on hand, and, as stated in the alleged instrument, after *specifying it*, "the same being" the property "*now and heretofore used by us in the construction of the Oregon Central Railroad Company.*"

It is perfectly clear from the language of the instrument what property would be purchased by the railroad company and, for the consideration so expressed, to be conveyed by Ben Holladay & Co., to it: *and it is likewise perfectly clear that the instrument did not contemplate property which Ben Holladay & Co. had not purchased or acquired, and "paid out," expended and incurred* money and liability for "*UNDER SAID CONTRACTS,*" or which they purchased distinct and independent from any use made or intended of it for the purpose of constructing or equipping the railroad, and which was in no wise necessary, or convenient, or connected with, the construction or operation of the railroad.

The complainant is confined to the allegations of its bill, and it must make its proof *secundum allegata et probata*. It charges that this land was purchased

by Ben Holladay & Co. for the purpose of securing from it the timber, and so as *to enable them to perform said contracts*. This allegation is obviously made with reference to the alleged document, and for the purpose of attempting to bring this land under the consideration purporting to be expressed in it and within the property which it is clearly expressed that such consideration would be given for,—property which Ben Holladay & Co. had “paid out, expended, and incurred” money or liability for, “*under said contracts.*”

Complainant has brought itself within the maxim *expressio unius est exclusio alterius*. Having alleged that the purpose of Ben Holladay & Co., in purchasing the land was to obtain the timber from it to enable them to cary out their said contracts, the allegation that such was the purpose excludes any theories that it was purchased for any other purpose connected with said contracts; and if it has not proved that to be the purpose, then the *probata* does not follow the *allegata*.

The money which Ben Holladay & Co. paid out for the *timber* upon the land, and for *mill sites* thereon, would undoubtedly be included in what the railroad company agreed to pay them in the way of reimbursement; but the money which Ben Holladay & Co. paid for the *land*, not only cannot be presumed to be included in the amount which the railroad company agreed to pay them, but the evidence shows conclusively, and beyond caviling, that Ben Holladay & Co. not only did not purchase or pay out or expend any money, or incur any liability, for the *land* for the pur-

pose of obtaining the timber from it and to secure mill sites thereon to enable them to carry out their said contracts, *but that they could not have purchased it or paid any money for it for that purpose*, for they already owned all the timber and the right to mill sites on the land, and to a great extent must have already taken the timber from it and used it at the time Ben Holladay purchased the land.

No fact could ever be more clearly established in a court of justice than this fact is established in this case.

The proof shows that Ben Holladay & Co. had already purchased, paid for and owned the timber and the right to mill sites upon the land by duly executed, acknowledged, stamped and recorded bills of sale, long before Ben Holladay purchased or paid for the *land*. There the matter stands. Counsel for complainant have not attempted to show or suggest any other reason, connected with the performance of the contracts, or otherwise, why Ben Holladay & Co. *might* have purchased it.

And the evidence in the case is so clear and overwhelming that the *land was never at any time* either necessary or convenient for use in the construction or operation of the railroad that any attempt to show that it was purchased "to enable Ben Holladay & Co. to further carry out said contracts," or that it would be included in the property comprehended in the alleged instrument for which "the agreement of said company" to reimburse Ben Holladay & Co. "for moneys

paid out, expended and incurred under said contracts” is expressed as the consideration, is beyond possibility.

Ben Holladay may have had any number of reasons for purchasing the land, but that is all immaterial and irrelevant to the issue in this case. It is not incumbent upon the defendant to show what reason he had for purchasing it. It suffices for the purpose of this case that *it was not purchased to enable Ben Holladay & Co. to further carry out the said contract*, and, to our mind, it conclusively appears that no consideration is recited in the instrument, or was ever paid for a transfer of the land by the alleged instrument.

It is so clearly shown that the land itself never had any relation to the railroad and was never either necessary or convenient to its construction or operation, and that its purchase by the railroad company would have been *ultra vires* and illegal, that a presumption arises against its being within the contemplation of the alleged instrument, and which presumption would have to be overcome by clear, affirmative proof that it was, that there was a valuable consideration shown and actually paid and that the title had in fact been transferred.

In *Brown vs. Chesapeake, etc.*, 73 Md. 601, the court say:

“I cannot assume that the company acquired or held land that was not necessary to the construction or operation of its works.”

THE INSTRUMENT PLEADED IN THE
BILL IS NOT A DEED.

Looking at the form, the contents, and the different parts of the instrument before the court in this case, it is difficult to see how it possesses any of the essential attributes which have long been held by courts as indispensable to an instrument intended to convey title to real property. We make the assertion with the utmost confidence that no adjudicated case can be found where any instrument of like or similar form, content, and execution, has ever been held to possess the necessary qualities of a conveyance of real property; and there are a great many cases where instruments closely resembling in form, and in substance the same as, the one in question, have been *held not to be deeds*, or sufficient to pass the title to, or any interest in, real property. The instrument alleged in the bill *describes* no real property at all; and it does not even mention real property in the granting clause, or operative part. Its execution was not attended by a single formality required by law. It is without a seal, witnesses, or acknowledgement ;and without the required internal revenue stamps. As a conveyance it could not be recorded, or used as evidence in any court. But the theory of complainant's counsel is that all of these essentials should be overlooked, and the matter of their omission brushed aside, while attention is fixed upon the explanatory clause for the purpose of making that the controlling feature of the alleged document. The document in its granting

clause, specifically and particularly describes a lot of personal property (including leases, or chattels real) which "Ben Holladay & Co. do sell, assign, transfer, set over, deliver and convey,"—and it "*specifies*" this property not once, but twice, in the granting clause. Then follows a recital, or explanatory clause:

"It being the intention of this conveyance to transfer to said Oregon Central Railroad Company all property real and personal of every name and nature now owned or possessed by the undersigned in the state of Oregon."

In *Ingells vs. Nooney*, 19 Mass. 362, the court had before it for interpretation an instrument substantially like the one here, and in which the words used were, "and all other things of me, the said Seth Phelps, whatsoever, as well real as personal, of what kind, nature, and quality soever." The court said:

"'All my goods, chattels, debts and moneys and all other things whatsoever,' would certainly not pass real estate; for the sweeping clause at the end of the sentence would embrace only things *ejusdem generis* with those which had been mentioned before. The words *real and personal*, added to this general clause, cannot, we think, in a deed, extend the grant to land, though it might embrace chattels real, such as leasehold estates, if there had been any such in the possession of the grantor."

In *McCurdy vs. Alpha, etc.*, 3 Nev. 24 (opinion by

Chief Justice Beatty), a case very similar to the one at bar, there is the following statement:

“But this *granting* clause is followed by an *explanatory* clause, which is in these words: ‘The *Interest herein intended to be conveyed to include also.*’ etc. * * * Now this explanatory clause is entitled to all due weight, and under the liberal rules adopted by the more modern decisions in the interpretation and enforcement of deeds, it might, perhaps, even have the effect of passing title to that which by no possibility could be understood as having been included in the granting clause of the deed. *But before giving such effect to mere explanatory words, it should appear from the instrument, beyond reasonable doubt, that it was the intent of the parties using the words to give them such effect.* Parties usually describe in the *granting* clause of a deed all that they intend to convey. And no court should hold that a party by his deed has conveyed more than is described or referred to in the granting clause, unless forced to that conclusion by language in other portions of the deed which clearly and *beyond all reasonable doubt* shows an intent on the part of the grantor to part with more property than was described in the granting clause.” (Our italics.)

See also:

Fogus vs. Ward, 10 Nev. 268;

Moore vs. McGrath, 1 Cowp. 9; 98 Eng. Rep. Reprint 959;

Bullard vs. N. Y., etc. R. R., 178 Mass. 570;

McGarrigle vs. Roman Catholic, etc., 145 Cal. 694;

Vedder vs. Sexton, 46 Barb. 188;

Head vs. Hunnicutt (Ala.), 55 So. 161;

Dickson vs. Wildman, 175 Fed. 580;

Ex parte Dawes, 17 Q. B. D. 281;

Huntington vs. Havens, 5 Johns. Ch. 23;

Parker vs. Kane, 65 U. S. (22 How.) 1;

Brown vs. Heard, 85 Me. 294;

Lee vs. Wysong, 128 Fed. 833.

As said in *McCurdy vs. Alpha, etc., supra*, "This explanatory clause, although not strictly the *habendum* of the deed, is somewhat similar to the *habendum*, and it appears to us should be construed in the same way." It is a well established rule that the subject matter of the grant can never be enlarged by the *habendum*, or by recitals or explanatory clauses. Such parts or clauses of a deed may be resorted to as an aid to interpretation, and to explain an uncertainty in the granting clause, but when the granting clause is clear, certain, and unambiguous they cannot affect the subject matter at all.

17 *Am. & Enng. Encyc. of Law*, p. 6, and cases cited.

The rule is thus clearly and succinctly stated in *Norton on Deeds* (2nd ed. of Elphinstone), p. 181:

“Many deeds, particularly modern deeds, have recitals, and it sometimes happens that the recitals are not consistent with the operative part.

When this is the case—

If both the recitals and the operative part of a deed are clear and unambiguous, but they are inconsistent with each other, the operative part is to be preferred.

If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. (*Ex parte Dawes*, (1886), 17 Q. B. Div. 275).

It follows that a specific description of property, or a specific statement of what is intended to be done, contained in the operative part, will not be controlled by a general description, or a general or ambiguous statement contained in the recitals.”

In *Ingleby vs. Swift*, 30 Bing. 84, the court say:

“Where the general words are only intended to make perfect that which has already been done, they will, in case of ambiguity, be referred to for explanation; but not if they are to do something new. In the present case, if the words do not effect something new, they must be rejected altogether. If a recital is inconsistent with the clear operative part of a deed, the latter must prevail.”

In *Howard vs. Earl of Shrewsbury*, L. R. 17 Eq. Cas. 394, the court say:

"I have not now to deal with general words, but I have to deal with precise and specific descriptions, and I feel myself, in the present state of the authorities which have settled the land marks of real property law in a way which no judge is entitled to disturb, in a position to say this, that I am not aware of any authority in which a clear, precise and specific description of property in the operative part of a deed has been controlled at law by the effect of mere recitals, or by inference from the covenants or subsequent parts of the deed."

See also:

Holladay vs. Overton, 14 Beav. 467;

Leggott vs. Barrett, 15 Ch. Div. 306;

Myrick vs. Myrick, 2 Crompton & Jervis,
223;

Orr vs. Mitchell, A. C. 238.

The decisions quoted and referred to constitute the foundation of the law of real property, and upon which titles rest secure, and they certainly furnish a safe guide to the court in the interpretation of the document alleged in this case, for there are no decisions expressing contrary views, that we are aware of.

The operative part of the instrument pleaded is not of doubtful meaning. It is perfectly plain, certain,

and intelligible. The only ground for attempting to cast a shadow of dubiety upon its meaning is by recourse to the recital or explanatory clause itself, and, in direct violation of the rule shown, and by claiming that an inconsistent and repugnant statement therein enlarges the subject matter of the grant, which, is clearly and specifically described in the granting clause; and this in spite of the fact that the instrument does not purport to have been drawn, executed, or stamped as a deed.

COMPLAINANT'S EQUITY.

There is no question but that courts of equity have jurisdiction in proper cases, and when the facts are clearly established by competent evidence, to prevent, or relieve against the effects of, *fraud, accident, or mistake*, and, within the principles of the established system of equity jurisprudence, to relax the rigor of the fixed rules of law, in order to promote the ends of justice. But,

“Equity is governed by the rules of law as to *legal* estates, interests and rights.”

1 *Pomeroy's Eq. Jur.*, sec. 426; *Ib.*, sec. 43.

“A court of equity does not make titles where there are none.”

Wilcutt vs. Overton, 2 Root (Conn.) 338.

“Although the jurisdiction of courts of law and equity is different in respect to facts and cir-

cumstances when proved, in general the rules of evidence and the principles which govern the means of obtaining proof are substantially the same in both; and the rules of property and interpretation are, or should be, the same in both."

Dougherty vs. Randall, 3 Mich. 581.

The legal title to the land here involved is unquestionably in the defendant. It is that fact which furnishes the reason for this suit in equity.

In *Catholic Bishop vs. Chiniqui*, 74 Ill. 317, the court say:

"The indispensable basis upon which a defendant to an action at law may resort to a court of equity to restrain the prosecution of such action, is, that he has some equitable defense which a court of law cannot take cognizance of, either by reason of want of jurisdiction, or from the infirmity of legal process. *The application to equity necessarily concedes the legal right*, and it is upon the ground that such legal right is sought to be enforced by the action at law is subservient to an equitable claim, which the defendant at law cannot set up there, that the court takes jurisdiction.

* * * It is not upon the ground of want of legal right in the plaintiff at law, that equity interferes, but upon the principle of preventing a legal right from being enforced in an unequitable manner, or for an unequitable purpose. *Equities calling for its interference, as clear as the legal*

right which it sees to control, must be shown before a court of chancery should interfere with an action at law. These principles are recognized by all authorities. (*Kerr on Inj.*, pp. 13, 14, and cases and notes.)”

“In equity, as well as at law, the plaintiff must recover on the strength of his own title, and not on the weakness of his adversaries; and a complete equitable title must be shown to entitle the plaintiff to recover, as in law a complete legal title must be shown.

Grand Gulf R. R. Co vs. Bryan, 16 Miss. 234;

Antones vs. Eslava AAla.Q, 9 Porter 527;

Pickens vs. Harper, 1 Smeed & M. Ch. (Miss.) 539.

Complainant does not contend that the alleged instrument was a deed, or that it could be construed to be such by the aid of extrinsic evidence; but it seeks by force of suggestion and inference remotely drawn from incompetent evidence to create, inductively, an apparently equitable *ought* outside of and apart from the instrument itself, or its possible function as a deed. The instrument is simply desired to serve as an incident in the rigging up of an equitable claim, and then to symbolize the equitable situation attempted to be conjured in to view from the ancient, obsolete, and incompetent records of the Oregon Central Railroad Company, as an *agreement to convey*, and which

might be "reformed and specifically enforced." The bill does not contain any averments or ask any relief upon any theory which attempts to define or have the alleged instrument construed as a deed. It avers that the instrument was "an agreement"; but nothing is alleged or shown as to the meaning, or the scope and effect, of the alleged instrument in any relation which, as an "agreement" it might bear to the land in question. There is nothing shown, or even conjectured, by complainant, as to why, if it had been intended that the alleged instrument should affect the title to the land, it was not intended to presently pass the title, or why the parties should have intended making "an agreement" to convey the title at some later period.

Of course complainant is forced into the position of claiming that the alleged instrument was "an agreement" (of which it seeks reformation and specific performance) because it is not a deed, and is incapable of being interpreted as such, and could not be admitted in evidence if it were, because not sufficiently stamped. And complainant's obvious purpose is to force upon the court a record of enormous size, containing matter of ancient history bearing more or less upon the relationship of Ben Holladay and the complainant, with the hope that something may be suggested or inferred therefrom that it might have been understood that the land was intended to be conveyed to the latter; and that the court will be so impressed by the plausibility of the theory, and the likelihood that such was the intention, that it will disregard and abandon established principles of law and

settled rules of evidence, and simply arbitrate the question upon that theory. Without any definite claim of any equitable right or title, other than what might be squeezed out of the alleged lost document, if proved, and construed with reference to its own terms, (there is nothing either pleaded or proved which gives to the document any broader significance than is expressed by its own terms); without averment or proof of a valuable consideration paid, or other condition performed; without any attempt to show an equitable estoppel; without showing possession, or improvements made, and without alleging or attempting to prove accident, mistake, or fraud, an equity is sought to be created, inductively, by the force of suggestion and inference; and the burden is cast upon the court to ascertain whence and how the suggestions and inferences are to be drawn, and how they may be metamorphosed and wrought into the title which complainant desires to have established in itself.

Complainant invoked the equity jurisdiction of the court upon the ground of an alleged lost instrument, but that was simply an incident leading to the equitable claims which it sought to establish. It undertakes to found its right to recognition in a court of equity on other grounds than the mere alleged loss of the document. It pleads the document, *and pleads its deficiencies to serve the ends which complainant desires to reach through the aid of the court's equitable powers*. It admits defects in the document pleaded, which made it incapable of operating as a conveyance of the legal title to the land, *and it seeks to have*

it reformed. This is invoking an independent and purely equitable remedy. And the bill further asks the court to construe the document pleaded as “*an agreement to convey,*” and when so construed, and *reformed*, to decree its *specific performance*. This is another independent and purely equitable remedy.

Pomeroy's Eq. Jur., (3rd ed.) sec. 365.

When, therefore, complainant seeks the privilege and indulgences which the court, in the exercise of its equitable powers may dispense, and asks to have administered for its benefit the remedies mentioned—reformation and specific performance,—it undoubtedly and necessarily, as said in the case of *Catholic Bishop vs. Chiniqui*, *supra*, “concedes the legal right” of the defendant, and seeks to “control the exercise” of that legal right upon the asserted claim of equities “*as clear as the legal right which it seeks to control.*”

WHAT ARE THE EQUITIES EXISTING IN COMPLAINANT'S FAVOR WHICH SHOULD PREVENT THE DEFENDANT'S LEGAL RIGHT FROM BEING ENFORCED?

Under what head of equity does complainant contend that its asserted claim should be allowed to countervail and supersede the defendant's clear and established legal right?

The three principal heads of equity are *accident*, *fraud*, and *mistake*. There are many equitable doctrines, and many equitable remedies, and the methods

of their application in the established system of equity jurisprudence are as numerous as the cases in which the equity jurisdiction may be invoked. But every case which finds recognition in a court of equity, every doctrine and principle invoked, and every remedy applied, comes necessarily under one or the other of the main heads of *accident, fraud, or mistake*. Unless there is some element in a party's claims falling within the comprehended meaning of one of these heads, there is no ground upon which the jurisdiction of a court of equity can be invoked.

“Where there is neither accident nor mistake, fraud nor misrepresentation, equity affords no relief to a party on the ground that he has lost his remedy at law through mere ignorance of fact, the knowledge of which might have been obtained with due diligence and inquiry. (*Willard's Eq. Jur.*, 70.)”

Fahie vs. Yressey, 2 Or. 23.

“The rule is well settled that, in order to justify the interposition of a court of equity to reform a written instrument for an alleged mistake of fact, it must be distinctly alleged and conclusively proved that the mistake was mutual to both parties, or that it was the mistake of one party, superinduced by the fraud or unequitable conduct of the other.”

Thornton vs. Krimble, 28 Or. 274; 42 Pac. 995.

When complainant comes into court pleading the alleged lost document as the basis of an equitable claim to this property, and asserting that it was intended to transfer the ownership of the land to the Oregon Central Railroad Company, although requiring reformation and specific performance to be decreed upon it to make it effectuate that intention, there can be no question but that complainant must show some just ground for its application to the court to add to the instrument what is necessary to make it evidence such intention, and some reason why the parties themselves did not make it evidence of the intention which complainant now wishes to show they had in mind, but didn't exhibit. Complainant has not pleaded, and has not attempted to show, either accident, fraud, or mistake, in the making of the alleged instrument, or in its neglect and failure to obtain from Ben Holladay during the seventeen years he lived after it is alleged the document was made, something that would clearly express the intention which it is now after more than forty years sought to attribute to him.

Not only is it not pleaded or shown that the alleged making of the instrument pleaded was attended by either accident, mistake, or fraud, but complainant by the averments of its bill expressly exonerates Ben Holladay from any imputation of fraud or unequitable conduct, and states that he "would have executed a formal instrument or deed of further assurance at any time, conveying by specific description

the title of said property to the Oregon & California Railroad Company, if requested so to do." (Rec. p. 21.)

Of course there is not a word of proof to support such an allegation, but the very contrary is made clearly apparent by the further allegation of the bill (Rec. p. 21), with reference to an agreement made between Ben Holladay and "Heinrich Hohenemsër, and others," known as the Frankfort Committee," and by the evidence introduced with reference to that alleged document. (Rec. p. 21, 694, 695.) The document itself was not proved, and would not have been competent evidence to prove any issue on behalf of complainant if it had been; but as an admission against complainant it shows that Ben Holladay divested himself of all interest in complainant company at the time that alleged agreement was made—February 29, 1876—ceased to be an officer of, and passed out of all sphere of influence in the affairs of the complainant company (Rec. p. 700); that there was a termination of all trust or fiduciary relations on his part toward complainant; and that confidence between him and complainant had been destroyed. (Rec. p. 694-696.) There was, in other words, a clean up by Ben Holladay of all his interest in the complainant company; and his relations with it were thenceforth as a stranger. That agreement can be construed in no other light than as a demand upon Ben Holladay, in the interest of complainant company, to transfer and convey to complainant any property which stood in his name, but which

equitably belonged to complainant at the date of that agreement; and in apparent pursuance of the design evidenced by said agreement on the part of the complainant to obtain from Ben Holladay a conveyance of any such property, complainant did obtain from Ben Holladay and wife, a quitclaim deed, dated March 4, 1876, "*to all and every the lands and real estate situate in the County of Multnomah in said State of Oregon now in the actual occupancy or possession of said party of the second part under claim of title thereto and ownership in fee simple thereof.*" (Defendant's Ex. 3; Rec. p. 1672).

The complainant company knew that this land stood in Ben Holladay's name, if it knew anything about it at all, or pretended to claim it; and it knew whether or not it stood in his name as trustee, either express or implied. It knew this all of the eleven years that Ben Holladay lived after the alleged "Frankfort Committee" agreement was made. It knew it while the land was being assessed to complainant for taxes; and it knew also that it had no evidence of title to the land which it could place of record, and that it had no means of protecting itself against a transfer of the land by Ben Holladay to a *bona fide* purchaser.

Davis vs. Judson, 159 Cal. 121

. REFORMATION.

"A written contract, in the absence of fraud, can only be reformed where it is shown by satisfac-

tory proof that there is a plain mistake in the contract, by the accidental omission or insertion of a material stipulation, contrary to the intention of both parties, by expressing something different in substance from the truth of that intent, and under a mutual mistake. To show that a written contract does not conform to the actual agreement made and intended to have been reduced to writing, the actual agreement should be stated, and the mistake in reducing it to writing alleged."

Wemple vs. Stewart, 22 Barb. 154.

See also:

Meier vs. Kelley, 20 Or. 86; 25 Pac. 73;

Willard vs. Davis, 122 Fed. 363;

Fulton vs. Colwell, 112 Fed. 831;

Remillard vs. Prescott, 8 Or. 37.

"Courts of equity will only relieve against mistake when mistake is clearly proved."

Graham vs. Berryman, 19 N. J. Eq. 29;

Ely vs. Early, 94 N. C. 1.

"Where in an action to correct a deed to make it conform to the alleged intention of the parties, two of them are dead, and the evidence as to the mistake is contradictory, the reformation will be refused."

Webb vs. Nease, 66 Ark. 1569; 49 S. W. 1081.

It cannot be said that the form of the instrument, and the manner of its execution and stamping, was due to a mistake of law; but if it could "there can be in the equity courts of the United States no relief from a mistake of law."

Uttermehle vs. Norment, 197 U. S. 40.

Complainant's position with reference to wanting a reformation of the alleged lost document is well and aptly characterized in the language of the court in

Husted vs. Van Ness, 36 N. Y. S. 1043.

"What the plaintiff really wants is not a reformation of the instrument, but a judicial construction of its meaning. He thinks it means just what he wants the court to say it means. It is to be reformed to mean this, if there is any doubt about it. If there is no doubt, then he wants it to be so construed. But whether reformed or construed, he wants 'certainty.' There is, as yet, no such head of equity."

SPECIFIC PERFORMANCE.

In *Odell vs. Morin*, 5 Or. 96, the court say:

"The requisites of a contract for the sale of land, of which the courts will be justified in decreeing specific performance, are clearly stated by Washington, J., in the case of *Colson vs. Thompson* (2 Wheat. 336): 'The contract which

is sought to be specifically executed ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague, or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it.' * * *

"It is urged by the counsel for appellant that the testimony is uncertain by reason of the lapse of time. This may be true, but one who has slept upon his rights for eighteen years is not in a position to ask a court of equity to relax the rules of law in his favor. The rule that a specific performance will be refused where the contract is vitiated by uncertainty, is applied with more than ordinary stringency against assignees and representatives of the contracting parties."

The instrument pleaded in this case, if it were established, would not be enforcible for many reasons. In the light of the above quoted decision it is obviously too uncertain. This is conceded by the allegations and prayer of the bill, wherein it is sought to have it *reformed*. But in addition to its uncertainty it is incapable of specific enforcement, because:

(1) No consideration, valuable or otherwise, is expressed in the instrument, or averred in the bill, or shown by the evidence, for the transfer of this land. It is the first requisite of a contract which equity will specifically enforce that it should be based upon a valuable and adequate consideration.

“Equity will not decree specific performance of a contract except upon a sufficient consideration for the promise. * * * Equity will never decree specific performance of a voluntary undertaking or promise.”

6 *Pomeroy's Eq. Jur.*, sec. 763.

(2) Any cause of action which could or might have existed by virtue of the alleged instrument, as “an agreement to convey,” to either have it reformed or specifically enforced, would be barred by the statute of limitations of the State of Oregon, and by complainant’s laches.

(3) The purchase or acquiring of the land by the Oregon Central Railroad Company, or by complainant, would have been beyond their charter powers and *ultra vires*; and a court of equity will not lend its aid to enforce an *ultra vires* and illegal contract.

(4) The complainant, by its abandonment of any claim of right or ownership in the land to the Oregon & California *Land Company*, has admitted the non-enforcibility of the alleged agreement, and has interpreted its own rights thereunder in that respect; and the abandonment also of the possession of the premises to the land company, for the purpose, as admitted by complainant’s land commissioner, McAllister, and testified to by its former land agent, Eberlein, of allowing the land company to acquire a title by adverse possession, and thereby to avoid the lien of the mortgage to the Union Trust Company, estops complainant from

asserting any rights in the land under the alleged lost agreement. ,

THE STATUTES OF LIMITATION OF THE STATE OF OREGON.

“Actions at law shall only be commenced within the periods prescribed in this title, after the cause of action shall have accrued; except, where, in special cases, a different limitation is prescribed by statute.”

Lord's Oregon Laws, Sec. 3.

“The periods prescribed in the preceding section for the commencement of actions, shall be as follows:

“Within ten years, actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action.

Lord's Oregon Laws, sec. 4.

“An action for any cause not hereinbefore provided for shall be commenced within ten years after the cause of action shall have accrued.”

Lord's Oregon Laws, sec. 11.

“A suit shall only be commenced within the **time limited** to commence an action as provided in Chapter II of Title I of this Code; and a suit for the determination of any right or claim to or interest in real property shall be deemed within the limitations provided for actions for the recovery of the possession of real property; * * * *Provided*, this section shall not be construed so as to bar an equitable owner in possession of real property from defending his possession by means of his equitable title.”

Lord's Oregon Laws, sec. 391.

Any right of action which might ever have accrued to complainant to have the alleged lost document, construed as an “agreement to convey,” reformed or specifically enforced, accrued, of course, at the date of the alleged making of such document, and would be barred by the foregoing statutes.

Any cause of action which complainant might have had to have a reformation of such document, if its existence had been proved, and it could be construed to be a *deed*, would likewise be barred by the statutes.

Wood on Lim. (3rd ed.) sec. 58;

Oakes vs. Howell, 27 Howard's Pr. (N. Y.)
145.

The equity courts of the United States consider themselves bound to enforce the statutes of limitations of the states which are in terms made applicable to suits in equity, as they are in Oregon.

- son v. Hewitt,
U.S. 309
v. Riker,
U.S. 448
- Teall vs. Schroeder*, 158 U. S. 172; 39 L. ed. 938;
Porterfield vs. Clark, 2 How. 75, 125; 11 L. ed. 185;
Lewis vs. Marshall, 5 Pet. 470; 8 L. ed. 195;
Hawkins vs. Barney, 5 Pet. 458; 8 L. ed. 190;
Buhl vs. Stephens, 84 Fed. 926. ,

We beg to again call the court's attention to the fact that there is no evidence, of any shade or quality, of any act or incident of possession, or claim of ownership, done upon or with reference to the land by complainant, during the seventeen years Ben Holladay lived after the instrument pleaded is alleged to have been made, nor until 1889, or 1890; and that nothing which can be called possession taken or held adversely to the true title in Ben Holladay, or his heirs, occurred until the land was fenced in March, 1905; and that the Oregon & California *Land Company* has paid the taxes on the land since it was fenced, and has claimed to own the land, and has assumed to be in possession of it, with the full knowledge and consent of the complainant company, since that time; and the *land company* leased the land to T. I. Hickey in 1908 (Ex. 32, 34; Rec. pp. 1343-1346), which is the last act of possession shown on the part of either company. The possession so shown on the part of the land company is, of course, presumed to continue until the presumption is countervailed by substantive proof.

Lazarus vs. Phelps, 156 U. S. 202;
 ,9 *Encyc. of Evidence*, p. 908. ,

By statute in Oregon a presumption obtains "That a thing once proved to exist continues as long as is usual with things of that nature."

Lord's Oregon Laws, sec. 799, subdiv. 33.

The evidence is too clear to admit of doubt or question, that as between the complainant company and the land company, the latter was in possession of the land, claiming to be the owner of it, with the consent of the complainant, at the time of the commencement of this suit, and at the time of the commencement of defendant's action in ejectment. The proviso, therefore, in section 391 of *Lord's Oregon Laws*, quoted above, can have no application in this case.

The alleged lost document is barred by an act of Congress from being received in evidence as a deed, if it were under any circumstances capable of being so construed, because it is not sufficiently stamped; and nothing could be plainer, or more obvious, than that any cause of action complainant might have had based upon such an instrument, if established, construed as anything other than a deed, was barred, not only at the time this litigation was commenced, but also before the death of Ben Holladay—July 8, 1887.

Any right of action which complainant could possibly have had, by reason of the matters alleged in the present suit, to establish the alleged lost document, construed either as "an agreement" or as a deed, is likewise barred by the statutes, and by complainant's laches.

“Every new right of action, in equity, that accrues to a party, whatever it may be, must be acted upon at the utmost within twenty years.”

Bowman vs. Wathan, 1 How. 189; 11 L. ed. 97;

Maxwell vs. Kennedy, 8 How. 210; 12 L. ed. 1051.

In *Phillipi vs. Phillipe*, 115 U. S. 159 (29 L. ed. 340), the Court, referring to the above rule, say:

“The same general rule has been laid down by this and other courts as the settled law of equity jurisprudence.”

And the statutes of Oregon make no exception with reference to the shorter period of ten years which they prescribe, which would prevent the statute from being invoked and applied to a cause of action to establish a lost deed, or other instrument. The meaning of the statutes could not be expressed more plainly than it is, and it is impossible, without doing violence to common sense, to construe them as excepting any cause of action or suit either at law or in equity, “except where, in special cases, a different limitation is prescribed by statute,” (L. O. L., sec 3); and a cause of action to establish a lost instrument is nowhere by statute made the subject of a different limitation.

If a party, having obtained a deed to land, should go into possession under it, and should thereafter lose his deed, if he remained in actual possession for the

same period that would bar a suit to restore the lost deed, his possession would, of course, ripen into a title; and his property rights would not be affected by the statute.

The complainant's alleged right of action in this case, to establish the alleged lost document, is not accompanied by any fact or circumstance which would create a title by adverse possession, or any equitable rights, within the period of the statute of limitations from the time it alleges the instrument was made and delivered—March 28, 1879. Just when the alleged instrument was, or might have been, lost, if it ever existed, is not shown by any evidence directly addressed to that subject by complainant. But it is shown by circumstances which, in the absence of direct evidence, must be accepted as proof that, if it ever existed, it was lost prior to 1883, or 1884.

Complainant's exhibit 8 is a record book labeled "O. & C. R. R. Co. Secretary, Records Deeds, Contracts, Agreements, etc." The keeping of this book was commenced in 1883, or 1884. "The purpose was to have a complete index to all the important papers belonging to the company." (Rec. p. 702; 468). *The alleged document was not listed or made a matter of record in that book*, and it seems to us that this is abundant evidence to prove that the document was not in the company's possession at the time the book was opened, or later during the time it was kept.

Complainant alleges in its bill, upon information and belief, that the instrument was destroyed in the

San Francisco fire of April 18, 1906; but this allegation is affirmatively and positively disproved. It is shown beyond the possibility of a doubt that the alleged instrument was never in San Francisco. (See Complainant's Ex. 36; Rec. p. 1347.)

It is the positive claim of complainant that if the instrument ever existed it would have been in the custody of its secretary,—at least up to the time that George H. Andrews, who was secretary and acting land agent from the fall of 1884 to October, 1904, twenty years, (Rec. p. 123, *et seq.*)—turned over the records and papers of his office as secretary to his successor, Mr. W. W. Cotton, December 21, 1904. (Com. ex. 15 and 16; Rec. p. 604, 611). Mr. Cotton in turn delivered the papers to C. W. Eberlein, acting land agent, August 23, 1905, (Ex. 9; Rec. p. 473, *et seq.*); but the alleged document was not among them.

So positively is the claim made that the document, if it ever existed, was in the custody of the secretary, that complainant has made no pretense of showing a search for it in any other place,—except the office of the complainant's land department in San Francisco, where the evidence shows conclusively it never was, and yet it was never entered upon the book, Exhibit 8, kept by the secretary for the very purpose of recording such documents. Mr. Eberlein, who was the first land officer of the company to have an office in San Francisco, and who moved the office from Portland to San Francisco, and to whom the papers were turned over by Mr. Cotton, after the latter had received them

from Mr. Andrews, testified positively that the alleged document was never in the land department in San Francisco, and all the facts and circumstances corroborate him. (Rec. p. 816.)

David Loring, a witness for complainant, was chief clerk in the office of George H. Andrews, as secretary and acting land agent, during all the time Mr. Andrews held those positions—from 1884 to 1904, twenty years. (Rec. p. 123, *et seq.*) If any one would have seen or known about the alleged instrument during that time it would have been Mr. Loring. He does not testify to having ever seen, or known, or heard of it. He remembered other documents of far less importance than this one would have been, if it had ever been thought of as a muniment of title, and as far back as 1894. (Rec. p. 141).

It is impossible, fairly, to reach any other conclusion from the evidence than that the alleged document, if it ever existed, was never known or heard of as being in the company's possession since 1884; and upon the authorities above referred to, and those which we will cite below, there is no escape from the legal conclusion that complainant's alleged cause of action to establish the instrument pleaded is barred both by the statute, and by the twenty-year rule in equity.

“Statutes prescribing the limitations of actions for the recovery of real estate apply by analogy to actions to supply lost deeds of real estate. The

right of action to supply a lost deed accrues upon the destruction or mutilation of the deed or writing sought to be supplied, and the statute commences to run from such destruction, or as soon as the loss is discovered, or can, by the exercise of reasonable diligence be discovered."

Brandenburg vs. McGuire (Ky), 44 S. W. 96.

See also:

Shepard vs. Cummings, 44 Tex. 502;

Wren vs. Wren (Ky.), 104 S. W. 737;

De Cordova vs. Smith, 9 Tex. 129; 58 Am. Dec. 136;

Wood on Lim., (3rd ed.) sec. 4;

Willis vs. Nehalem Coal Co., 52 Or. 90; 96 Pac. 528.

COMPLAINANT'S LACHES.

Even if complainant's alleged cause, or causes, of action were not barred by the statute, they would, unquestionably be barred by complainant's laches. It is certain that complainant has not acquired any rights, either legal or equitable, by reason of any possession of the land, or otherwise; but that whatever right it could possibly have would depend upon the establishment, by competent proof, of the alleged lost instrument, and whatever could be construed therefrom in complainant's favor. And the doctrine of laches applies

as well to complainant's alleged right of action to establish the alleged lost instrument, as to any substantive rights it could have, accruing therefrom, if established.

Defendant and appellee has the legal title of record to the land, and it is protected by every presumption of law and equity in favor of its validity. If complainant would show any equities inconsistent with defendant's established and presumptively valid title, it *must prove them by evidence which is clear and convincing*. Doubtful, vague, or uncertain proof will not do. Suggestion and inference, surmise and conjecture, are not sufficient.

It is only because of complainant's assertion of equitable claims and its attack upon defendant's legal title of record that the latter has ever had occasion to look to any evidence concerning her title as it stands upon the records, other than the record itself; and that occasion now arises for the first time in this suit, commenced more than forty years after complainant alleges its rights accrued. The only evidence defendant could ever need would be such as might be required to meet the present occasion, and to show the falsity of complainant's asserted rights as against her established record title.

The evidence which once existed and would have been available to disprove the complainant's present claims, has long since perished by the death of the principal party to the transaction alleged as the basis

of complainant's claim, and of all of the parties who might have been witnesses thereto.

“One who holds the legal title, or paramount lien upon the legal title, to real estate, is not guilty of laches which will prevent him from asserting his equities therein in defense of a suit in chancery to compel him to surrender his legal title or lien, by the fact that he did not institute any suit, or commence any action to avoid or foreclose the equities of the complainant. It is time enough for him to present his equities to a court of chancery when his legal title is there assailed.”

Farmers' L. & T. Co. vs. Denver L. & G. Co., 126 Fed. 53.

Complainant, if it had any rights, or supposed rights, knew of them, and knew every fact and circumstance which ever existed that might tend to give them verity, since March 28, 1870. It has waited until the principal party, and whose title it now assails, is dead—waited *seventeen years* during which he lived, and *twenty-four years* since his death—before asserting the claim it now makes to this land, or of attempting to have any rights it thought it had established by judicial proceedings—and which it knew to be absolutely necessary after Ben Holladay's death to make for it a legal title.

By its own conduct complainant has shown that it did not believe in the truth or honesty of the claim it now, in this suit, asserts after the lapse of all those

years. Without any effort to obtain a conveyance from Ben Holladay, or his heirs; without ever seeking to litigate and have determined the justice of its asserted claims as against their presumptively valid title of record, complainant has been a party to an attempt to have a title gained by adverse possession by "an auxiliary" company (Rec. p. 766, 768), a corporation called the "Oregon & California *Land* Company," without any transfer, or attempted transfer, to such land company, of any rights claimed by complainant; and without there having been any claim of right or color of title, whatsoever, on the part of the land company. (See particularly Complainant's exhibits 34 and 36; Rec. pp. 1345, 1347). It is very clear that if the defendant had not instituted her action in ejectment, complainant would have perpetuated its laches by not coming into court at all. If it were thorough and in *bona fide* need of equitable relief, why did it not during the past forty and more years attempt to perfect its title? It was only when the event which it feared happened—the bringing of the ejectment action—that an effort is made to bolster up a defense to that suit by the assertion of antiquated and stale claims of equitable rights; and when the principal parties and the persons who must have known the principal facts in the case have been taken away by death, and defendant has no means of controverting such claims by the affirmative proof which might have been available at an earlier date.

There is no pretense by complainant that any of the

matters which it now pleads are only of recent knowledge. Indeed complainant alleges and relies upon the very opposite. It asserts that it has claimed the land on the basis of the alleged lost document and the transaction in which it was made, since March 28, 1870; alleges possession since that date, and alleges payment of taxes, all in reliance upon that alleged document. It alleges that Ben Holalday would, at any time after the alleged document was made, if he had been requested so to do, have made to complainant a deed of further assurance. With all of this knowledge for all of those years, complainant has neglected to assert its alleged rights in any way, but has attempted rather, surreptitiously, to enable another corporation to gain a title by adverse possession, not only as against the heirs of Ben Holladay, but also as against any rights existing or claimed by complainant itself. Such conduct is an *admission* by complainant that it had no right or title; or, at least, that it recognized an outstanding title and ownership superior to any which it had or claimed.

Williamson vs. Moseley, 35 S. E. (Ga.) 301;
Sedg. & Wait, Trial of Title to Land (2nd
 ed.) sec. 758.

In *The German Am. Sem. vs. Kiefer*, 4 N. W. (Mich.) 636, a case which involved a situation almost identical with the one presented here, Justice Cooley said:

“If the defendant’s connection had but recent-

ly come to the knowledge of the officers of the corporation, this might be no conclusive reason for refusing to the complainant relief; *but it would be the height of injustice* to permit complainant, with full knowledge of the facts, to delay suit while the persons who were familiar with the facts were one by one passing away, and at last bring suit under circumstances which at best must leave the court in doubt whether the remaining evidence does not disclose a partial, defective, and misleading case."

And see the following authorities, all equally in point:

Speidel vs. Henrici, 120 U. S. 377; 30 L. ed. 718;

Hinchman vs. Kelley, 54 Fed. 63;

Mackall vs. Casilear, 137 U. S. 566; 34 L. ed. 776;

Hammond vs. Hopkins, 143 U. S. 224;

Brown vs. Buena Vista Co., 95 U. S. 157;

Jenkins vs. Pye, 12 Pet. 241;

Ulrich vs. Cress, 85 Ill. 101;

Hill vs. Umberger, 77 Va. 653;

Morris vs. Parry, 85 S. W. 620;

Holsberry vs. Harris, 49 S. E. 404; 56 W. Va. 320;

Hatcher vs. Hall, 77 Va. 576;

Harrison vs. Gibson, 23 Gratt. 212;

Lane, etc. Co. vs. Locke, 150 U. S. 193; 37
L. ed. 1049.

Citation of authorities to the same effect might be multiplied, but it is unnecessary, for there is no doubt about the rule stated by Justice Cooley, and, in our view, there is no doubt about its application to the facts presented in this case. It is too well established to admit of doubt or question that the element of the doctrine of laches so conspicuously present and important in this case—the death of the principal parties and witnesses,—is recognized by courts of equity as affording one of the most cogent reasons for the existence of the doctrine, and as one of the greatest forces in directing its application.

ULTRA VIRES.

The alleged instrument, as “an agreement” to convey, if it were otherwise free from vice, would not be specifically enforced by a court of equity for the purpose of transferring to complainant the legal title of this land, because it clearly appears that upon the part of either the Oregon Central Railroad Company, or the complainant, it would be *ultra vires*. Unless the complainant could prove by competent evidence the existence, execution, contents, and delivery of the alleged lost document, and that by virtue thereof a legal title vested in the Oregon Central Railroad Company, the present case would be squarely within the rule announced by Mr. Justice Miller in

Case vs. Kelly, 133 U. S. 21.

The soundness and authority of that decision has never been and could not be intelligently questioned. The known character and ability of the eminent jurist who wrote the opinion makes the mention of his name a sufficient encomium upon its merits. It has been cited and approved in

United States v. Nor. Pac. R. Co., 152 U. S.
300.

The statute under which the Oregon Central Railroad Company was attempted to be incorporated was as follows:

‘4th. To purchase, possess and dispose of such real and personal property as may be necessary and convenient to carry into effect the object of the incorporation.”

Deady & Lane's Gen'l Laws of Oregon,
1843-1873, Chapter 2, page 524.

The power sought to be availed of under this statute, and as expressed in the articles of incorporation of the Oregon Central Railroad Company, were as follows:

“The enterprise, occupation and business for which this company incorporates is to construct a railroad with all the necessary branches, fixtures, buildings and appurtenances, from Portland, in Oregon, southerly about three hundred miles to the California line, to maintain the said road in

good condition and repair, and to employ the same in the transportation of freight and passengers and freight." (Com. Ex. 28; Rec. p. 1337.)

"It is a well settled rule of construction of grants by the legislatures to corporations, whether public or private, that only such powers can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the object of the grant."

Minturn vs. Larue, 23 How. 435; 16 L. ed. 574;

And see also:

McCormick vs. Market Bank, 165 U. S. 538;

O'Brien vs. Wheelock, 184 U. S. 450;

Carroll vs. Campbell, 108 Mo. 559; 17 S. W. 884;

State vs. Lincoln Trust Co., 144 Mo. 586; 46 S. W. 593;

State vs. Murphy, 130 Mo. 10; 31 S. W. 594;

Huntington vs. Sav. Bank, 96 U. S. 388.

"An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not on that has a slight or remote relation to it.

Hood vs. N. Y. etc. R. R., 22 Conn. 1;

Buffet vs. Troy, 40 N. Y. 176.

“Unless the power claimed be directly and immediately appropriated to the execution of the specific powers, and a useful and necessary means to give them effect, it cannot be recognized as within the scope and measure of the grant.”

Curtiss vs. Leavitt, 15 N. Y. 157.

“Irrespective of the operation of statutory restrictions, it is a settled principle of American jurisprudence that a corporation cannot take and hold land except in so far as reasonably necessary to carry out the objects of its creation.

5Thomp. Corp. (1st ed.) sec. 5772.

“It is a sound conclusion that a railroad corporation cannot be allowed to *speculate in real estate*, and that it has no power to buy and hold lands situated at a distance from its road, which it cannot possibly use in constructing or operating its road.”

5Thomp. Corp. (1st ed.) sec. 5792.

“The contract must be valid and binding, free from inequitable imperfections, and such as a court of equity will *specifically enforce against an unwilling purchaser*.”

Willis vs. Harris (N. C.) 10 S. E. 704;

Pomeroy's Eq. Jur., sec. 1161.

The evidence showing that the land has never, at

any time, been either necessary or convenient to the construction, maintenance, or operation of the Oregon Central Railroad Company's railroad, and which passed by conveyance to complainant, has all been referred to in preceding parts of this brief, and it is too clear to need further discussion.

Respectfully submitted,

HENRY CONLIN,

San Francisco, Cal.

H. W. HOGUE,

Portland, Or.

Attorneys for Appellee.

APPENDIX.

"KNOW ALL MEN BY THESE PRESENTS: That we, the undersigned, Ben Holladay & Co. of Portland, Oregon, in consideration of the cancellation this date by the Oregon Central Railroad Company at Salem, Oregon, of all certain contracts in writing heretofore existing between said company and the undersigned, in relation to the construction of a railroad and telegraph line from Portland, Oregon, through the Willamette, Umpqua and Rogue River Valleys to the California line, and the agreement of such company to pay the undersigned for all moneys paid out, expended and incurred under such contracts, to wit; an amount not less than Eight Hundred Thousand Dollars in U. S. Gold Coin. It being a part of the arrangement that all the property hereinafter specific should be transferred and delivered to said Company, and in consideration of the full sum of One Dollar to us in hand paid, the receipt whereof is hereby acknowledged, have sold, assigned, set over, transferred, delivered and conveyed, and by these presents we, Ben Holladay & Co. do sell, assign, transfer, set over, deliver and convey unto said Oregon Central Railroad Company, of Salem, Oregon, all sawmills and machinery connected therewith, all machinery, tools, implements, apparatus of every name and description, all live stock, horses, mules, cattle, work oxen, carts, drays, wagons, gearing-tackle, and all leases and all property of every name and nature owned by us, in the possession of Ben Holladay & Co., all of such property bein in the state of Oregon, principally in Multnomah and Clackamas counties, the same being the mills, machinery, tools, implements, aparatus, live stock, horses, mules, cattle, carts, drays, wagons, gearing-tackle railroad ties, iron rail spikes and other railroad materials now and heretofore used by us in the construction of the Oregon Central Railroad Company. It being the intention of this conveyance to transfer to said Oregon Central Railroad Company all property real and personal of every name and nature

now owned or possessed by the undersigned in the state of Oregon.

"TO HAVE AND TO HOLD the said property and every part thereof unto the said Oregon Central Railroad Company, of Salem, Oregon, its successors and assigns, absolutely and forever.

"IN WITNESS WHEREOF we have hereto set our hands and seals this 28th day of March, A. D. 1870.

BEN HOLLADAY

C. TEMPLE EMMET

By Ben Holladay, Atty in Fact.

BEN HOLLADAY & CO.

By Ben Holladay."

(Five Cent U. S.
stamp cancelled.)

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OREGON AND CALIFORNIA RAIL-
ROAD COMPANY, a Corporation,
Complainant and Appellant,

vs.

MARIA DE GRUBISSICH, nee MARIA DE
POURTALES,

Defendant and Appellee.

No.
2181

SUPPLEMENTAL AND REPLY BRIEF FOR COMPLAINANT AND APPELLANT.

In view of the technical objections urged by counsel for defendant and appellee, (pages 1-10, Brief of Appellee) that the Assignments of Error (Transcript, pp. 1678-1679-1681) do not state separately and particularly each error asserted and intended to be urged, and that the specifications of errors relied upon do not state "as particularly as may be in what the decree is alleged to be erroneous," we deem it advisable, in addition to the statement of issues (pages 16, 17, 18, 19, Brief for Appellant), and the statement of points and authorities (pages 20 to 36, Brief for Appellant) to repeat for the convenience of the court and counsel, the Assignments of Error, as follows:

ASSIGNMENTS OF ERROR

I.

“Said Court erred in holding, adjudging or decreeing that the bill of complaint and complainant’s suit herein should be dismissed and that the defendant should have and recover of and from the complainant her costs and disbursements.

II.

Said Court erred in holding, adjudging or decreeing that the allegations of the bill of complaint were not proven, and particularly in holding, adjudging or decreeing that the complainant had failed to prove the alleged agreement of March 28, 1870, purporting to be signed by Ben Holladay, C. Temple Emmet, and Ben Holladay & Company, set out and described in the bill of complaint.

III.

Said Court erred in holding, adjudging or decreeing that the said agreement of March 28, 1870, so purporting to be signed as aforesaid, did not operate as a contract for a conveyance of the North Half of the Northeast Quarter of Section 32, and the East Half of the Southeast Quarter and Lots 5 and 6 of Section 29, all in Township 1 South, Range 2 East of the Willamette Meridian, in Clackamas County, Oregon, to the Oregon Central Railroad Company.

IV.

Said Court erred in holding, adjudging or decreeing that the complainant is not now the owner in fee simple and in possession of said lands, and entitled to the possession thereof, against the defendant and all other persons claiming the same by, through or under the said Ben Holladay & Company, said C. Temple Emmet, or Ben Holladay, or either thereof.

V.

Said Court erred in holding, adjudging or decreeing that the complainant was not entitled to a decree against the defendant specifically enforcing said agreement of March 28, 1870, and in quieting the title to the complainant to the said premises as aforesaid.

VI.

Said Court erred in not holding, adjudging and decreeing that in reliance upon the said agreement of March 28, 1870, and the said deed of March 29, 1870, executed by the Oregon Central Railroad Company to the Oregon and California Railroad Company, complainant herein, had gone into immediate possession of said lands and the whole thereof, and has been in the actual, open, notorious and adverse possession thereof under claim of title, since said March 29, 1870, and continuously for a period of more than thirty years, and in not holding, adjudging and decreeing that the defendant

herein was barred by the statute of limitations of the State of Oregon.

VII.

Said Court erred in not holding, adjudging and decreeing that the claim of defendant to the said lands or any part thereof is stale, and in not holding, adjudging and decreeing that Ben Holladay was estopped to deny the execution of said agreement of March 28, 1870, and was estopped to deny as to the complainant the transfer and agreement to convey said property to the Oregon Central Railroad Company, and its transfer to the Oregon and California Railroad Company by the Oregon Central Railroad Company, and in not holding, adjudging and decreeing that the defendant was bound by or estopped by the acts, acquiescence and omissions of the said Ben Holladay in reference to said premises, and in not holding, adjudging and decreeing that the defendant was barred by her laches and by said estoppel from asserting any claim to said premises or any part thereof.

VIII.

Said Court erred in not holding, adjudging and decreeing that the allegations of the complainant's bill of complaint were supported by the evidence, and in not holding, adjudging and decreeing that the complainant was entitled to a decree perpetually enjoining and restraining the defendant from prosecuting the

said action at law described in the bill of complaint, whereby the said defendant in said action at law was seeking to recover the possession of the said real property, and in not granting a perpetual injunction against the further prosecution of said action in ejectment for the recovery of said land, and in not entering a decree for the complainant as prayed for in the bill of complaint, and for the costs and disbursements of this suit."

These assignments of error sufficiently state or specify, as particularly as reasonably practicable, in what the decree is alleged to be erroneous, but inasmuch as Rule 24 is for the convenience of the Court and counsel, and compliance therewith is not jurisdictional, we may succinctly specify in what particulars the decree is erroneous.

The decree of the Court was entered on July 9, 1912, dismissing the bill of complaint of complainant (pages 85-86 Transcript). No findings of fact or conclusions of law are set out in the decree, but the decree reads:

"This cause having come on to be heard on the 12th day of March, 1912, upon the pleadings and proofs, and Mr. Wm. D. Fenton having been heard on the part of complainant, and Mr. Henry Conlin on the part of the defendant, and due deliberation having been had, it is ordered, adjudged and decreed that the

said bill of complaint be and the same is hereby dismissed, with costs of the defendant to be taxed.”

Subdivision 4, Rule 24, reads:

“When there is no assignment of errors, as required by Section 997 of the Revised Statutes, counsel will not be heard, except at the request of the Court; and errors not specified according to this rule will be disregarded, but the Court, at its option, may notice a plain error not assigned or specified.”

SPECIFICATION OF ERRORS RELIED UPON.

I.

The complainant was entitled to a decree as prayed for in its complaint, in this, that the evidence offered and admitted on behalf of complaint, and particularly the minute books of the Oregon Central Railroad Company, Complainant's Exhibit 7, purporting to show the corporate action in reference to the written proposition of Ben Holladay & Company and its acceptance, and in reference to the agreement of March 28, 1870, described in the bill of complaint, and the minute books of the Oregon & California Railroad Company, admitted in evidence, purporting to show the purchase of the property of the Oregon Central Railroad Company by the Oregon & California Railroad Company, were com-

petent and sufficient evidence upon which the complainant was entitled to a decree as prayed for in the complaint, and the Court erred in rejecting and refusing to consider this evidence, and in refusing to find that the complainant was the equitable owner of the premises described in the complaint, and entitled to a decree specifically enforcing the agreement of March 28, 1870, and quieting the title of complainant to the premises, as against the defendant.

II.

The Court erred in entering a decree dismissing the bill of complaint, in this, that the written proposition of Ben Holladay & Company and its acceptance, shown by the minute books of the Oregon Central Railroad Company, Complainant's Exhibit 7, show a valid agreement upon the part of Ben Holladay & Company to convey the premises described in the complaint, and its acceptance by the Oregon Central Railroad Company; and also show that the agreement of March 28, 1870, set out in Complainant's Exhibit 7, in the minute book of the Oregon Central Railroad Company, was a valid instrument or contract in writing, duly proven and executed pursuant to the said proposition and acceptance. And the Court erred in refusing to consider said evidence showing said agreement, and in

refusing to hold that complaint was entitled to have the same specifically enforced as against the defendant.

III.

The Court erred in dismissing the bill of complaint and in refusing to hold that the complainant has been in continuous, open, notorious, exclusive and adverse possession of the lands described in the complaint, under claim and color of title, adversely to the defendant, since March 29, 1870, and in refusing to hold that the defendant and her predecessors in interest, and all others claiming title, are and have long since been barred by the statute of limitations.

IV.

The Court erred in dismissing the bill of complaint and in refusing to find that complainant was the owner in fee simple of the premises described in the complaint, and that the agreement of March 28, 1870, as shown by said Exhibit 7, and the formal agreement set out in said minutes of that date, or some other conveyance of these lands, will be presumed to have been duly executed by the firm of Ben Holladay & Company and Ben Holladay.

V.

The Court erred in dismissing the bill of complaint and refusing to find that the premises described in the bill of complaint were purchased by Ben Holladay & Company for the purpose of securing the timber thereon and the location of a sawmill to manufacture the timber into ties, etc. in building a railroad for the Oregon Central Railroad Company, and primarily for the use and benefit of said company; and in refusing to find and decree that the premises described in the complaint were and are the premises identified and intended to be covered by the agreement evidenced by the minute book of the Oregon Central Railroad Company, of date March 28, 1870, showing the proceedings of March 28, 1870, Complainant's Exhibit 7.

VI.

The Court erred in dismissing the bill of complaint and in refusing to hold that by the written agreement of March 28, 1870, executed by Ben Holladay, C. Temple Emmet, and the firm of Ben Holladay & Company, and in refusing to hold that by the written application of Ben Holladay & Company and its acceptance by the Oregon Central Railroad Company, and the other proceedings evidenced by the minute book of the Oregon Central Railroad Company, of date March 28, 1870, Complainant's Exhibit 7,—Ben Holladay & Company, and Ben

Holladay, agreed to convey to the Oregon Central Railroad Company, for a valuable consideration, all their right, title and interest in and to the premises described in the complaint; and in refusing to hold that on March 29, 1870, Oregon Central Railroad Company duly conveyed said premises to the Oregon & California Railroad Company, and that ever since said date said last named company has been in the actual, open, notorious and adverse possession of said premises under claim and color of title thereby deraigned.

VII.

Said Court erred in holding, adjudging or decreeing that the allegations of the bill of complaint were not proven, and particularly in holding, adjudging or decreeing that the complainant had failed to prove by competent evidence the agreement of March 28, 1870, purporting to be signed by Ben Holladay, C. Temple Emmet and Ben Holladay & Company, set out and described in said bill of complaint, and had failed to prove by competent evidence by said minute book of the Oregon Central Railroad Company, Complainant's Exhibit 7, that Ben Holladay & Company submitted a proposition in writing for the sale of said premises to the Oregon Central Railroad Company, and that said Oregon Central Railroad Company, on said date,

accepted the same, as shown by said minute book, Complainant's Exhibit 7.

VIII.

Said Court erred in holding, adjudging or decreeing that the said agreement of March 28, 1870, and the proceedings evidenced by the minute book of the Oregon Central Railroad Company, Complainant's Exhibit 7, of that date, did not operate as a contract or agreement to convey the premises described in the complaint to the Oregon Central Railroad Company.

IX.

Said Court erred in holding, adjudging or decreeing that the complainant is not now the owner in fee simple, in possession, and entitled to the possession of the lands described in the complaint, as against the defendant and all other persons claiming the same by virtue of or under Ben Holladay & Company, C. Temple Emmet, and Ben Holladay, or either thereof.

X.

Said Court erred in holding, adjudging or decreeing that the complainant was not entitled to a decree against the defendant specifically enforcing said agreement of March 28, 1870, and the contract evidenced by the proceedings shown in the minute

book of the Oregon Central Railroad Company, of date March 28, 1870, as evidenced by Complainant's Exhibit 7, and quieting the title of the complainant to the premises described in the complaint.

XI.

Said Court erred in not holding, adjudging or decreeing that in reliance upon the said proceedings and agreement of March 28, 1870, as evidenced by said Complainant's Exhibit 7, and the said deed of March 29, 1870, executed by the Oregon Central Railroad Company to the Oregon & California Railroad Company, complainant herein, had gone into the immediate possession of said lands and the whole thereof, and has been in the actual, open, notorious and adverse possession thereof under color and claim of title, since March 29, 1870, and continuously for a period of more than thirty years, and in not holding, adjudging or decreeing that the defendant herein was barred by the statute of limitations of the State of Oregon.

XII.

Said Court erred in not holding, adjudging or decreeing that the claim of defendant to the said lands or any part thereof is stale, and in not holding, adjudging and decreeing that Ben Holladay was estopped to deny the execution of said agreement of March 28, 1870, and was estopped to deny

the proceedings of March 28, 1870, evidenced by said minute book of the Oregon Central Railroad Company, Complainant's Exhibit 7, of that date, and was estopped to deny, as to the complainant, that said proceedings amounted to an agreement to convey said property to the Oregon Central Railroad Company, evidenced thereby, and its transfer to the Oregon & California Railroad Company by the Oregon Central Railroad Company; and in not holding, adjudging and decreeing that the defendant was bound by or estopped by the acts, acquiescence and omissions of the said Ben Holladay in reference to said premises, and in reference to said proceedings; and in not holding, adjudging and decreeing that the defendant was barred by her laches and by said estoppel from asserting any claim to said premises or any part thereof.

XIII.

Said Court erred in not holding, adjudging and decreeing that the allegations of the complainant's bill of complaint were supported by the evidence, and in not holding, adjudging and decreeing that the complainant was entitled to a decree perpetually enjoining and restraining the defendant from prosecuting said action at law described in the bill of complaint, whereby the said defendant in said action at law was seeking to recover the possession of the said real property, and in not granting a perpetual

injunction against the further prosecution of said action in ejectment for the recovery of said land, and in not entering a decree for the complainant as prayed for in the bill of complaint, and for the costs and disbursements of this suit.

XIV.

Said Court erred in not holding and adjudging that the said Ben Holladay, and Ben Holladay & Company, were parties to the suit of John Nightengale et al. versus Oregon Central Railroad Company et al., Complainant's Exhibits 61-a-b, 61-c, 52, 53, and 54, (pages 1475, 1508-1516, 1548 to 1649 Transcript) and in not holding and decreeing that Ben Holladay and Ben Holladay & Company were bound by the stipulation made in said cause as to the execution of the agreement of March 28, 1870, and in not holding and decreeing that Ben Holladay, by his affidavit submitted in said cause, had full knowledge and admitted the execution of said agreement and all the proceedings had on March 28, 1870, as shown by Complainant's Exhibit 7. (See pages 1475-1508 Transcript, setting out affidavit of Ben Holladay in the Nightengale case.)

POINTS AND AUTHORITIES.

I.

The Court at its option, under Rule 24, subdivision 4, may notice a plain error assigned or specified, even though by any technical or harsh rule it could be claimed that the Assignments of Error in this record are not in accordance with the rule. An entire failure to file Assignments of Error is not a ground for dismissal of the writ of error for want of jurisdiction. This requirement is not jurisdictional, and the same rule would apply in cases on appeal.

Loveland's App. Jurisdiction, Sec. 72
The Myrtie M. Ross, 160 Fed. 19-22

In any view of the matter, where the Assignments of Error are general, and have been filed with the petition for appeal, this Court is not without jurisdiction, and may permit an amendment.

Flickinger v. First Nat'l Bank of Vandalia,
145 Fed. 162 (C. C. A. 6th Ct.)

A stricter rule obtains upon writs of error than upon appeals, and this is so from the nature of the two remedies. It is however respectfully submitted that under the authorities cited by counsel for appellee, the Assignments of Error are in accordance with Rule 11, and are as plain and concise as possible, and do set out separately and particularly

each error asserted and intended to be urged, and under leave of Court granted at the hearing of this cause, we have repeated the Assignments of Error for convenience, and have specified separately the errors relied upon, which we think will fully advise counsel and the Court of the points of contention made by appellant.

II.

The minute books of the Oregon Central Railroad Company showing the corporate action of that company in respect to the agreement of March 28, 1870, and in respect to the written proposition of Ben Holladay & Company submitted on that date, and its acceptance by the Oregon Central Railroad Company, (See Complainant's Exhibit 7) and the minute books of the Oregon & California Railroad Company, (Complainant's Exhibit 14) showing the corporate action of that company in reference to the purchase of the property of the Oregon Central Railroad Company, were sufficient and competent evidence in favor of the complainant, to prove the corporate action of both companies, and to prove that the instrument set out in the minute books of the Oregon Central Railroad Company of March 28, 1870, was not only executed, but acted upon by all the parties; and sufficient and competent evidence to prove that the proceedings shown by said Exhibit 7 constitute a contract binding upon Ben Holladay

& Company and Ben Holladay, and upon the Oregon Central Railroad Company, for the sale of these premises by Ben Holladay & Company and Ben Holladay, to the Oregon Central Railroad Company, and an agreement to convey said premises, and to evidence the same by the formal execution of a subsequent deed. These corporate records were thus competent primary evidence.

Lord's Oregon Laws, Sections 695, 790,
6691, 6694

Rudd v. Robinson, 126 N. Y. 113-117, 118
2 Modern Law of Corporations (Machen)
Secs. 1120-1124

Harrison v. Morton, 83 Md. 456, 474

Wigmore on Evidence, Sec. 1074-1661

Turnbull v. Payson, 95 U. S. 418, cited in
Finn v. Brown, 142 U. S. 57

Liggatt v. Glenn, 51 Fed. 381-393

Carey v. Williams, 79 Fed. 906 Contra.

Sigua Iron Co. v. Greene, 88 Fed. 207 Contra.

Lewis Adm'r v. Glenn, Trustee, 84 Va. 947

Vanderwerken v. Glenn, 85 Va. 9

Pittsburg Wheeling etc. R. R. Co. v. Appel-
gate, etc., 21 W. Va. 172

2 Thompson on Corporations, Sec. 1855,
2nd Ed.

Cent. Elect. Co. v. Sprague Elect. Co., 120
Fed. 925, 927

Boggs v. Lake Port. etc. Ass'n, 111 Cal. 354

Farwell v. Houghton Copper Works, 8
Fed. 66

- Booth v. Dexter Steam Fire Eng. Co., 118 Ala. 369
- Heintzelman v. Druids Relief Ass'n, 38 Minn. 138
- North River Meadow Co. v. Shrewsbury Church, 22 N. J. Law, 424-428
- Glenn v. Liggett, 47 Fed. 472-5-9
- Glenn v. McAllister's Ex'rs., 46 Fed. 883-887
- Glenn v. Orr, 96 N. C. 413
- Holland v. Duluth Iron Mg. & Dev. Co., 65 Minn. 324, 332
- 3 Cook on Corporations, Sec. 714, note 3, 6th Ed.
- South Branch Ry. Co. v. Long's Adm'r, 43 W. Va. 131
- 3 Cook on Corporations, Sec. 727, 6th Ed. pp. 2380-2 notes
- Zang v. Wyant, 25 Colo. 551

These minutes were also admissible as proof of ancient possession under color of title, and being more than thirty years old and produced from the proper custodian, were admissible in evidence as ancient documents, and were sufficient upon which to predicate color of title and possession thereunder.

- Hamerschlag v. Duryea, 58 N. Y. App. Div. 288, affirmed 172 N. Y. 622
- 1 Greenleaf, Sec. 141, 15th Ed.
- Bogardus v. Trinity Church, 4 Sandf. Ch. 633
- Dodge v. Gallatin, 130 N. Y. 117

These minute books were competent primary evidence under the laws of Oregon. Section 695 Lord's Oregon Laws reads:

"Primary evidence is that which suffices for the proof of a particular fact until contradicted and overcome by other evidence. For example, the certificate of a recording officer is primary evidence of a record; but it may be afterwards overcome upon proof that there is no such record."

Section 790 Lord's Oregon Laws reads:

"Writings of deceased persons admissible in what cases. The entries or other writings of a like character of a person deceased or without the state, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as primary evidence of the facts stated therein, in the following cases:

3. When it was made in the performance of a duty specially enjoined by law."

Section 6691 Lord's Oregon Laws is as follows:

"The directors, when elected and qualified at the first meeting thereafter, shall elect one of their number president, who shall preside at their meetings, and perform such other special duties as the directors may authorize, and at the same time shall appoint a secretary, whose duty it shall be to keep a fair and correct record of all the official business of the cor-

poration. From the first meeting of the directors, the powers vested in the corporation are exercised by them, or by their officers or agents under their direction, except as otherwise specially provided in this chapter.”

Section 6694 Lord’s Oregon Laws is as follows:

“Every corporation organized under this chapter shall keep a stock book, in such manner as to show intelligibly the original stockholders, their respective shares, the amount paid, and the amount due thereon, if any, and all transfers thereof, which stock book, or a certified copy thereof, as to the items in this section specified, *as well as all other books of the corporation necessary for carrying on its business, shall be subject to the inspection, at all reasonable hours, of any person interested therein and applying therefor.*”

See also authorities cited pages 20, 21, 22, 23, 24, 25, and 26 Complainant’s original brief.

III.

Objection is made to consideration in evidence of the agreement of March 28, 1870, upon the ground that it is insufficiently stamped, in this, that it is a conveyance specified in Schedule “B” of the Act of June 30, 1864, (13 Stats. at Large, pp. 292, 295, 298, 299)

Schedule "B" in so far as it is material, reads:

"Agreement or contract, other than those specified in this schedule; any appraisement of value or damage, or for any other purpose; for every sheet or piece of paper upon which either of the same shall be written, five cents."

"Conveyance, Deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons by his, her or their direction, when the consideration or value does not exceed five hundred dollars, fifty cents."

Section 158 of the Act of June 30, 1864, (13 Stats. 291, 299) was amended by the Act of July 13, 1866, (14 Stats. 142) as follows:

"That section one hundred and fifty-eight be amended by striking out all after the enacting clause and inserting in lieu thereof the following: that any person or persons who shall make, sign, or issue, or who shall cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, or shall accept, negotiate, or pay, or cause to be accepted, negotiated, or paid, any bill of exchange, draft, or order or promissory note for the payment of money, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax chargeable thereon, and cancelled in the man-

ner required by law, *with intent to evade the provisions of this act*, shall, for every such offense, forfeit the sum of fifty dollars, and such instrument, document, or paper, bill, draft, order, or note, not being stamped according to law, shall be deemed invalid and of no effect." * * *

Under these statutes unstamped instruments are valid in the absence of fraudulent intent to evade the provisions of the law.

- Campbell v. Wilcox, 10 Wall. 422
- Pugh v. McCormick, 14 Wall. 361
- 24 Am. & Eng. Ency. of Law, p. 935, notes 5 and 6, 2nd Ed.
- 22 Cyc. 1620, note 33
- Hallock v. Jaudin, 34 Cal. 167
- Dudley v. Wells, 55 Me. 145
- Govern v. Littlefield, 13 Allen, 127
- Tobey v. Chipman, 13 Allen, 123
- Willey v. Robinson, 13 Allen, 128
- Schermerhorn v. Burgess, 55 Barb., 422
- Harper v. Clark, 17 Ohio St. 190
- Cassidy v. St. Germain, 22 R. I. 53
- Hitchcock v. Sawyer, 39 Vt. 412
- Weltner v. Riggs, 3 W. Va. 445
- Wingert v. Zeigler, 91 Md. 318
- Dowell v. Applegate, 7 Fed. Rep. 881 (Cir. Ct. Dist. of Ore.)
- U. S. v. Griswold, 8 Fed. Rep. 556, 571 (Cir. Ct. Dist. of Ore.)
- Dowell v. Applegate, 8 Fed. Rep. 698 (Cir. Ct. Dist. of Ore.)

- Dorr Cattle Co. v. National Bank, 127 Iowa, 153
 Dorr Cattle Co. v. National Bank, 4 A. & E. Ann. Cases 519
 Harvey v. Wieland, 115 Iowa, 564
 Mitchell v. Ins. Co. 32 Iowa, 421
 Rowe v. Bowman, 183 Mass. 488
 Garland v. Gaines, 73 Conn. 662
 Garland v. Gaines, 84 Am. St. Rep. 182, extended note 185, 190.
 Black v. Woodrow & Richardson, 39 Md. 194-218
 Carson & Vickery v. Phelps, 40 Md. 73, 96

Such unstamped instruments in the absence of a fraudulent intent to evade the provisions of the law to be proven at the time by the party objecting to the introduction of the document in evidence, are admissible in evidence.

- 24 Am. & Eng. Ency. of Law, p. 935, note 6, 2nd Ed.
 22 Cyc. 1620, note 33
 Hooper v. Whitaker, 130 Ala. 324
 State v. Glucose Ref. Co., 117 Iowa, 524, 530
 Latham v. Smith, 45 Ill. 29
 Rheinstrom v. Cone, 26 Wis. 163. Id. 7 Am. Rep. 48
 Green v. McCracken, 64 Kans. 330
 Lerch v. Snyder, 112 Pa. St. 161
 Waterhouse v. Rock Island Alaska Mfg. Co. 97 Fed. 466

But this instrument was sufficiently stamped, as a simple contract. It was not a conveyance, deed, or other such writing. It was not witnessed, acknowledged or sealed, and was not a specialty. It was, as it appears to be, a simple contract.

IV.

Ben Holladay was a quasi party to the Nightengale case, and bound by all that was done therein, and was particularly bound by his own affidavit and the answer of the defendants, which he caused to be prepared, and the stipulation of counsel in that case. Both in the answer and in the affidavit he admits the execution of the agreement of March 28, 1870, and the proceedings shown by the minute book of the Oregon Central Railroad Company of that date, and stipulates that the copy in the record as an exhibit to the pleadings in that case, is a correct copy of the original. The rule is settled that all persons are parties who have a direct interest in the subject matter of a suit, and have a right to control the proceedings, make a defense, examine witnesses, or prosecute an appeal, and although such parties are not nominally parties to the record.

24 Ency. page 735-737, 2nd Ed.

Kramer v. Singer Mfg. Co., 93 Fed. 636

Lovejoy v. Murray, 3 Wall. 1-19

Robbins v. Chicago Cy. 4 Wall. 657, 672

1 Greenleaf on Evidence, p. 523, 15th Ed.

Green v. Bogue, 158 U. S. 478, 503

Tootle v. Coleman, 107 Fed. 41, Id. 57
L. R. A. 120

Kamm v. Rees, 177 Fed. Rep. 20

Litchfield v. Goodnow, 123 U. S. 549

In *Lovejoy v. Murray*, *supra*, Mr. Justice Miller, quoting Mr. Greenleaf, says:

“Under the term parties, in this connection, the law included all who are directly interested in the subject matter, and had a right to make defence, or to control the proceedings; and to appeal from the judgment. This right involves, also, the right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are strangers to the cause. But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them, or in privity with them, are equally concluded by the same proceedings.”

In the *Nightengale* case the proceedings of March 28, 1870, recorded in the minute book of the Oregon Central Railroad Company, and the proceedings by which Ben Holladay & Company disposed of the property, real and personal, owned by that firm, to the Oregon Central Railroad Company, and by which the Oregon Central Railroad Company disposed of its railroad, including this property, to the Oregon & California Railroad Company, were directly involved in the *Nightengale* case under a

charge of fraud made against Ben Holladay. He would be estopped to dispute those proceedings which he then defended, and his successor and his heir and devisee, the defendant herein, is equally estopped.

V.

The defendant Maria de Grubissich is the granddaughter of Ben Holladay, and claims under the Last Will and Testament of Ben Holladay, as his devisee. She is therefore in privity with him, and is not a "stranger." She is bound by his acts, acquiescence and conduct, and what would estop him, will estop her. Ben Holladay was not a "stranger" or "third person" in his relations with the Oregon Central Railroad Company and the Oregon & California Railroad Company. He was the controlling stockholder of the Oregon Central Railroad Company; was present at the meeting of March 28, 1870, invited its action, and was authorized by the Oregon & California Railroad Company to conduct the negotiations between the Oregon Central Railroad Company and the Oregon & California Railroad Company which led to the purchase by the Oregon & California Railroad Company of the properties of the Oregon Central Railroad Company, including the properties theretofore owned by Ben Holladay & Company, agreed to be conveyed

by them and by Ben Holladay to the Oregon Central Railroad Company.

O'Donnell v. McIntyre, 118 N. Y. 156, 165

Balfour v. Burnett, 28 Or. 72

United States v. Henderlong, 102 Fed. 2-4

VI.

The evidence shows conclusively that the real premises described in the complaint belonged to Ben Holladay & Company, and were acquired by that firm for use in the performance of the contracts for the construction of the railroad of the Oregon Central Railroad Company, assumed by Ben. Holladay & Company, and the written proposition of Ben Holladay & Company, submitted to and accepted by the Oregon Central Railroad Company on March 28, 1870, and the formal agreement executed by the Oregon Central Railroad Company and Ben Holladay & Company on that date, found in the records, shown by the minute book, Complainant's Exhibit 7,—clearly and plainly describe by words of general description, these lands, and the testimony identifies these lands as those used in the performance of these contracts, and upon which one of the saw mills was located. That is certain which can be made certain.

See Point III and authorities thereunder, pages 26-27 Complainant's original Brief of Appellant.

ARGUMENT

By the overwhelming weight of authority these minute books of the Oregon Central Railroad Company and of the Oregon & California Railroad Company were competent primary evidence, and are made so, in our judgment, by statute.

Lord's Oregon Laws, Secs. 695, 790, 6691, 6694

They are, however, admissible under the great weight of authority.

"It is undoubtedly true that entries made in the due course of business, by officers authorized to make them, are admissible in evidence against the stockholders. This is said to be on the theory that the officer, in making such written entries, acts as the agent and representative, not only of the corporate entity, but as the stockholders regarded as unincorporated partners. And such records were held competent against a corporator who was shown to have been present at the time of the transactions therein recorded, and to have assented to the entries made."

II Thompson on Corporations, Sec. 1855, 2nd Ed.

"The minute book of the proceedings of the directors' meetings is proper evidence to prove a corporate contract or the authority of a corporate agent to act or contract for it."

III Cook on Corporations, Sec. 714, 6th Ed.
 II Modern Law of Corporations (Machen)
 Secs. 1120-1124

Professor Wigmore says:

“The record is not somebody’s hearsay testimony to the act, it is the act itself.”

Wigmore on Evidence, Sec. 1074; also Sec. 1661.

In *Rudd v. Robinson*, 126 N. Y. 113 (a case cited by counsel for appellee) the court says:

“The books of corporations for many purposes are evidence not only as between the corporation and its members, and between members, *but also as between the corporation or its members and strangers*. They are received in evidence generally to prove corporate acts of a corporation such as its incorporation, its list of stockholders, its by-laws, *the formal proceedings of its board of directors* and its financial condition when its solvency comes in question.”

The court in that case *did* hold that the *books of account* of a corporation are not competent evidence to establish an account or claim against a trustee or stockholder in an action brought in behalf of the corporation. Such is the general rule.

In *Harrison v. Morton*, 83 Md. 456, 475, the court says:

“It was shown that the original paper by which this assignment was made by the in-

ventor to the Barrel Company, *a copy of which is contained in the minutes of the latter*, was searched for among the papers of said company, and in other places where it was believed it might be found, but it was not discovered. We think, under the circumstances, a proper foundation was laid for the introduction of the copy as secondary evidence. But, independent of this view, it would seem that the minutes are admissible to show, and they were offered for that purpose, that the plaintiff having sold his patent to the Barrel Company, could not again sell it to the defendant. The minutes are the best evidence to show that the stockholders agreed to and ratified the proposition of the inventor to subscribe for \$90,000 of the company's stock and pay for his subscription by an assignment of his said patent. Beach on Private Corporations, Sec. 295."

This case is not only authority to sustain the competency and admissibility of these minutes, Complainant's Exhibit 7, as proving the execution of the contract of March 28, 1870, but is competent and admissible to show that the Oregon Central Railroad Company had agreed to and accepted the written proposition of Ben Holladay & Company, by which Ben Holladay & Company agreed to convey these premises, among others, to the Oregon Central Railroad Company, upon the terms and conditions therein stated.

At this point the particular attention of the

Court is called to the minutes of the Oregon Central Railroad Company set out beginning at page 390 of Transcript, and ending with the proceedings of March 28, 1870, page 440 Transcript. The Court will observe that on March 28, 1870, it is recited (see page 392 Transcript) that Ben Holladay & Company presented a written communication of that date, addressed to the President and Directors of the Oregon Central Railroad Company. The attention of the Court is called to the third paragraph of this written proposition submitted by Ben Holladay & Company, (Page 395 Transcript) which reads:

“The Oregon Central railroad and telegraph lines, so far as completed, together with an uncompleted portions of the line, including all rolling stock and other property belonging thereto or connected therewith, shall be surrendered up and delivered to the possession of the “Oregon Central Railroad Company,” *and all mills, machine shops, machinery, tools, implements, horses, mules, carts, live stock and all property of every name and description now owned by or standing in the name of Ben Holladay and Company in Oregon; or in their possession, and intended for use in and about the construction of such railroad shall be transferred, conveyed and delivered to your company.*”

It will be noticed that under the fifth paragraph of this written proposition submitted by Ben

Holladay & Company, in case the proposition was accepted, there should be a resolution of the Board of Directors accepting them and agreeing to the terms proposed, and a contract should be then executed to be signed by the Oregon Central Railroad Company and by Ben Holladay & Company, and "an agreement in writing, duly executed and stamped by the parties embodying the foregoing, shall also be entered into." (See page 397 Transcript).

Immediately following the submission of this proposition the minutes show that thereupon J. H. Moores presented a preamble and resolution reciting the presentation of the communication by Ben Holladay & Company, setting it out in literal terms, (Pages 397, 398, 399 Transcript) and reciting that the statements contained in such communication are true; and thereupon a resolution was adopted accepting the proposition contained in such communication of Ben Holladay & Company, (See pages 401, 402 Transcript) and authority was conferred by this resolution to execute a written contract with Ben Holladay & Company, as set out, and as requested. This written contract was thereafter evidenced by an agreement of date March 28, 1870, (See pages 410 to 414 Transcript) and was duly executed, as shown by the minute book of the Oregon Central Railroad Company, by I. R. Moores, President of the Oregon Central Railroad Company,

by Geo. E. Cole, Secretary, and by Ben Holladay & Company, by Ben Holladay.

This formal agreement signed by Oregon Central Railroad Company, by I. R. Moores, President, Oregon Central Railroad Company, by Geo. E. Cole, Secretary, and signed Ben Holladay & Company, by Ben Holladay, (Pages 410-414 Transcript) in the sixth paragraph reads as follows:

“Ben Holladay and Company party of the second part herein shall, of even date with these presents, and in consideration of the agreements herein contained, make, execute and deliver to the “Oregon Central Railroad Company” party of the second part, a conveyance and transfer of all the mills, machinery, ties and other railroad material, horses, mules, oxen, tools, implements, carts, drays, wagons now owned by Ben Holladay and Company, in Oregon, and heretofore and now used in about the construction of said Rail Road, *together with all other property owned by or belonging to Ben Holladay & Co. in Oregon.*”

This agreement had ten cents United States Revenue Stamps cancelled thereon, and, under the authorities holding that the minute books are competent primary evidence of what the corporation did, this agreement is fully proven as the corporate act of the Oregon Central Railroad Company, and as the act of Ben Holladay & Company, after the written proposition of Ben Holladay & Company

had been submitted to the Board of Directors and acted upon and accepted.

If the agreement of March 28, 1870, set out in the minute book, to which counsel for appellee so strongly objects for want of a revenue stamp thereon, should be deemed for any reason incompetent or inadmissible in evidence, the minute book showing the preceding agreement evidenced by the written proposition of Ben Holladay & Company, accepted by the Oregon Central Railroad Company, and the formal agreement of the same date executed by Oregon Central Railroad Company and by Ben Holladay & Company, by which Ben Holladay & Company agreed to convey to the Oregon Central Railroad Company all property owned by or belonging to Ben Holladay & Company in Oregon, sufficiently show a valid agreement to convey the premises in dispute; and there could be and is no objection to the admissibility of these minutes and of the agreements evidenced thereby, for want of a proper stamp. The case could be disposed of upon the sufficiency of these minutes as evidence of the contract to convey, and that without regard to the formal agreement of March 28, 1870, set out in the minute book, which was agreed to be executed by Ben Holladay & Company.

In *Turnbull v. Payson*, 95 U. S. 418, cited in *Finn v. Brown*, 142 U. S. 57, the court says:

“Where the name of an individual appears on the stock book of a corporation as a stockholder, the *prima facie* presumption is that he is the owner of the stock, in a case where there is nothing to rebut that presumption; and, in an action against him as a stockholder, the burden of proving that he is not a stockholder, or of rebutting that presumption, is cast upon the defendant.”

In *Carey v. Williams*, 79 Fed. 906, the Circuit Court of Appeals for the Second Circuit, declined to follow *Turnbull v. Payson*. *Carey v. Williams*, cited by counsel for appellee, may be deemed an authority against the admissibility of corporate records to bind *a stockholder who was not present, or who did not participate in the proceedings*. This is the extent, however, of the doctrine of *Carey v. Williams*.

As supporting the contention that *Turnbull v. Payson* is an authority for the position asserted by us, see

Liggett v. Glenn, 51 Fed. 381-393, where the opinion of the Circuit Court of Appeals for the Eighth Circuit was written by Judge Shiras. The Circuit Court of Appeals for the Second Circuit adhered to its opinion expressed in *Carey v. Williams*, in an opinion written by Lacombe, in the case of *Sigua Iron Co. v. Greene*, 88 Fed. 207, but neither the case of *Carey v. Williams*, nor *Sigua*

Iron Company v. Greene, is an authority against the admissibility of minutes *showing what the corporation did, and especially where the shareholder or person sought to be charged was present and participated in the meeting, as here.*

In Central Electric Co. v. Sprague Electric Co., 120 Fed. 925, 927, Jenkins, Circuit Judge, speaking for the Circuit Court of Appeals for the Seventh Circuit, says:

“The assumption of an obligation by a corporation must be the act of its Board of Directors, and its action is manifested by resolution spread upon its records. The minutes constituted, necessarily, the best evidence of such promise.”

And so here, the minutes showing the acceptance by the Oregon Central Railroad Company of the written proposition of Ben Holladay & Company, by which Ben Holladay & Company agreed to convey these premises to the Oregon Central Railroad Company, is the best evidence of the corporate action, and necessarily competent primary evidence of the action of Ben Holladay & Company, under the circumstances of this case.

In Boggs v. Lakeport A. P. Ass’n, 111 Cal. 354, 356, the court says:

“It is the duly authenticated record in the books of the corporation which is the best evidence, and in the absence of such, any

competent secondary evidence may be admitted to show what the act of the Board was."

In *Booth v. Dexter Steam Fire Engine Co.*, 118 Ala. 369, 380, the court says:

"The defendant objected to the reading of the minutes and their introduction, for that they were illegal and irrelevant. The court did not err in overruling the objection. The minutes of the meeting when proved were competent evidence of what was done at the meeting. 1 Greenl. Ev. Sec. 493. The minutes recited that on January 17, 1894, there was a meeting of the plaintiff corporation, and that a motion was *made to accept the notes sued upon*, and to deliver bond up to Booth."

This case is particularly applicable to the admissibility of the minutes of the Oregon Central Railroad Company showing the written proposition of Ben Holladay & Company and the acceptance by the Oregon Central Railroad Company, by which written proposition Ben Holladay & Company agreed to convey these premises to the Oregon Central Railroad Company.

In *Holland v. Duluth Iron Mining & Dev. Co.*, 65 Minn. 324, 332, the court says:

"The rule is that, where the name of an individual appears on the stockbooks of a corporation as a stockholder, the *prima facie* presumption is that he is the owner of the

stock; and in an action against him as a stockholder the burden of proving that he is not a stockholder, or of rebutting the presumption, is cast upon the defendant. 1 Cook, Stock. & Stockh. Sec. 55, and cases cited in notes. From some of these cases it will be seen that the rule has been laid down much more broadly than here stated. The reasons why, in opposition to the general rule, entries in the books of a corporation are admissible for the purpose of showing who are stockholders, are well stated in Glenn v. Orr, 96 N. C. 413, 2 S. E. 538, and Liggett v. Glenn, 2 C. C. A. 286, 51 Fed. 381. The entries introduced here were found in a stock or share book kept by the corporation. *It may not have been the book required by Statute*, for, although otherwise complete, it failed to show what amount of money had been paid on the shares issued to Wilson. But the rule above stated does not require that the entries introduced in evidence shall be found in a book kept in any particular manner, or that *it contains the entries prescribed by statute*. It is enough if it be the stock book of the corporation."

And so here, it is enough if the minute book is produced from the proper custodian, and appears to be regular, and if it appears to have been kept by the Secretary required to be appointed by Section 6691 Lord's Oregon Laws. Section 6691 Lord's Oregon Laws requires the Secretary to keep a fair and correct record of all the official business of the

corporation. It was shown in this case that the record was so kept, and that the recording Secretary was dead. Under the express provisions of Section 790 Lord's Oregon Laws, this evidence or writing thus made by the recording Secretary was primary evidence of the facts stated in the record thus required to be kept.

In *North River Meadow Co. v. Shrewsbury Church*, 22 N. J. L. 424, 428, the court says:

"The books and minutes of a corporation, though not usually evidence against third persons (*Ben Holladay & Company* and *Ben Holladay* are *not* third persons within the meaning of this rule), are competent evidence of the proceedings of the corporation. In the *Highland Turnpike Company v. McKean* (10 John. R. 162) the court says, 'the general rule is (and it is a rule of evidence essential to public convenience), that corporation books are evidence of the proceedings of the corporation,' "

citing

Owings v. Speed, 5 Wheaton, 420;

Wood v. Jefferson County Bank, 9 Cowen, 194

In *Glenn v. Orr*, 96 N. C. 413, 415, the court says:

"These books were competent evidence to prove that the appellee was a stockholder, and the state of his account as such, in respect to his stock. It was so decided in the similar case

of *Turnbull v. Payson*, 95 U. S. 418, in which the Court say: 'Where the name of an individual appears as a stockholder, the prima facie presumption is that he is the owner of the stock, in a case where there is nothing to rebut the presumption; and, in an action against him as a stockholder, the burden of proving that he is not a stockholder, or of rebutting that presumption, is cast upon the defendant.' See also *Hamilton etc. Plankroad Co. v. Rice*, 7 Barb. 157; *Coffin v. Collins*, 17 Me. 440; *Whitman v. The Granite Church*, 24 Me. 236; *Wood v. Railroad Co.*, 32 Ga. 273; *Hoogland v. Bell*, 36 Barb. 57; *Morawetz on Pr. Corp.* Sec. 270.

"The rule of evidence underlying this and similar decisions, seems to be founded in convenience, and to rest upon the further ground, that corporations in this country are the creatures of statute, with prescribed rights and powers, subject to an important extent, to public control and supervision, and are therefore presumed to exercise their powers as allowed and required by law, and to keep their records properly and truly."

See also

White Mts. R. R. Co. v. Eastman, 34 N. H. 124, 136

1 Greenl. Ev. Secs. 141, 142, 15th Ed.

Colfax Hotel Co. v. Lyon, 69 Iowa, 683, 689

In the last cited case the court says:

“But the burden was on plaintiff to prove its acceptance of whatever proposition or offer he had made at the meeting to take the stock; and *the record was competent evidence to show acceptance*, and it should have been admitted for that purpose.”

Under the facts and circumstances of this case, it appearing from the affidavit of Ben Holladay in the Nightengale case that he was present and knew of all the proceedings of the meeting of March 28, 1870, it must be held that the written proposition thus accepted, as shown by the minute books, was submitted, and that Ben Holladay & Company executed the agreement of that date, found in the minute books.

It will not be necessary to review at length the authorities cited to the effect that unstamped instruments are valid in the absence of fraudulent intent to evade the provisions of the law. The attention of the court is called particularly to the cases of *Dowell v. Applegate*, 7 Fed. Rep. 881; *United States v. Griswold*, 8 Fed. 556, 571; *Dowell v. Applegate*, 8 Fed. 698; all cases decided in the Circuit Court of the United States, for the District of Oregon, and all holding that such unstamped instruments, in the absence of fraudulent intent to evade the provisions of the law, are valid and enforceable, following the cases of *Campbell v.*

Wilcox, 10 Wall. 422. Indeed, the text writers treat this as an elementary rule of law.

24 Am. & Eng. Ency of Law, Sec. 935, and
notes

22 Cyc, page 1620, note 33

See also an extended note to the case of

Garland v. Gaines, 84 Am. St. Rep. 182, 185

The rule is also equally well settled that such unstamped instruments, in the absence of a fraudulent intent to evade the provisions of the law, to be proven at the time by the party objecting to the introduction of the document in evidence, *are admissible in evidence*. The cases cited by us need not be specifically reviewed.

This court held, in *Waterhouse v. Rock Island Alaska Min. Co.*, 97 Fed. 466, under the Act of June 13, 1898, (30 Stat. 448, 460), commonly known as the "War Revenue Law," that the particular document there offered in evidence was not admissible, basing that ruling upon the express provisions of Section 14 of that Act. But it will be noted that in *Sackett v. M'Caffrey*, 131 Fed. 219, the court expressly reserved the question whether, if the certificate of acknowledgment should be stamped, as provided by Section 13 of the Act of June 13, 1898, as amended by the Act of March 2, 1901, (31 Stat. 941) it would not be admissible in evidence, on a new trial. Both of these cases construe the pro-

visions of the Act of June 13, 1898, (30 Stat. 448, 458). It does not appear from the opinion in either case whether any contention was made that to render the document inadmissible for want of a stamp, it should have been shown by the party objecting that it was not stamped, or insufficiently stamped, with intent to defraud the revenue laws. If, under the authorities construing the Act of June 30, 1864, and amendments thereto, the document, although declared by the statute to be invalid for want of a stamp, or because it was insufficiently stamped, could be enforced unless it was shown to have been thus unstamped or insufficiently stamped with intent to defraud the United States, and if such document could be admitted in evidence except where it was shown to be unstamped or insufficiently stamped with intent to defraud the United States, notwithstanding the amendatory provisions of the Act of June 30, 1864, rendering such unstamped or insufficiently stamped document inadmissible in evidence, it is not clear but that the same rule should obtain under the Act of June 13, 1898, and some of the authorities cited by us have so held.

The court below proceeded upon the theory that the minute books under consideration were not competent for the purpose of disposing of *the rights of strangers*, or even of *members* or officers of a corporation in their *private dealings with it*. The court in its opinion says: "So that the entries in

the minutes of the corporation are not evidence of the execution and delivery of the alleged contract, as against Ben Holladay, or his heirs." The court also excluded consideration of the exhibits in the Nightengale case, upon the ground that Ben Holladay was not a party. It will be seen, however, that under the authorities Ben Holladay was not a "stranger" or "third person" in dealing with the Oregon Central Railroad Company, but that he was an active participant and shareholder, *present at the meetings, and is shown to have been so present by his own affidavit in the Nightengale case*; and he is in no sense a "stranger" within the meaning of the authorities. He was also a quasi party to the Nightengale suit. The subject matter of that suit involved an alleged fraudulent disposition of the property of the Oregon Central Railroad Company, procured by Ben Holladay, and a like fraudulent disposition of the assets of Ben Holladay & Company by his act in collusion with the Oregon Central Railroad Company and the Oregon & California Railroad Company. Under all of the authorities he was a party, and bound by everything that was done in the Nightengale case.

It is also well settled under the authorities that the defendant here claiming under Ben Holladay, is in privity with him.

"The term privity denotes mutual or successive relationship to the same rights of

property; and privies are distributed into several classes, according to the manner of this relationship. Thus, there are privies in estate, as donor and donee, lessor and lessee, and joint-tenants; privies in blood, as heir and ancestor, and coparceners; privies in representation, as executors and testator, administrators and inestate; privies in law, where the law, without privity of blood or estate, casts the land upon another, as by escheat. All these are more generally classed into privies in estate, privies in blood, and privies in law. The ground upon which admissions bind those in privity with the party making them is, that they are identified in interest; and, of course, the rule extends no farther than this identity."

I Greenl. on Evidence, Sec. 189, 15th Ed.

"Under the term "parties," in this connection, the law includes all who are directly interested in the subject matter, and had a right to make defence, or to control the proceedings, and to appeal from the judgment. This right involves also the right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as *strangers* to the cause. But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term "privity"

denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party, is that they are *identified with him in interest; and wherever this identity is found to exist, all are alike concluded*. Hence, all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity."

I Greenl. on Evidence, Sec. 523, 15th Ed.

This rule is sustained by the following authorities:

Cramer v. Singer Mfg. Co., 93 Fed. 636

Lovejoy v. Murray, 3 Wall. 1-19

Robbins v. Chicago City, 4 Wall. 672

Green v. Bogue, 158 U. S. 478

Tootle v. Coleman, 107 Fed. 41

Litchfield v. Goodnow, 123 U. S. 549

Parsons v. Urie, 104 Md. 238; same case, 10

Am. & Eng. Ann. Cases, 278, 280

Stacy v. Thrasher, 6 How. 43-59

5 Ency. of U. S. Sup. Ct. Rep. p. 918, note 12

Kamm v. Rees, 177 Fed. 20 (Ninth Circuit)

10 Ency. of U. S. Sup. Ct. Rep. p. 743,
authorities cited.

In Stacy v. Thrasher, 6 How. 43, 59, the court says:

"Privies are divided by Lord Coke into three classes—

1st, privies in blood; 2nd, privies in law; and 3rd, privies by estate. The doctrine of estoppel, however, so far as it applies to persons falling under these denominations, applies to them under one and the same principle, namely, that a party claiming through another is estopped by that which estopped that other respecting the same subject matter. Thus, an heir who is privy in blood would be estopped by a verdict against his ancestor, through whom he claims."

As further bearing upon the question of who are parties, privies, or "strangers," Mr. Black, in his work, "Black's Law Dictionary," 2nd Ed., defines the term "strangers" as follows:

"By this term is intended third persons generally. Thus, the persons bound by a fine are parties, privies, and strangers; the parties are either the cognizors or cognizees; the privies are such as are in any way related to those who levy the fine, and claim under them by any right of blood, or other right of representation; the strangers are all other persons in the world, except only the parties and privies. In its general legal signification the term is opposed to the word "privy." Those who are in no way parties to a covenant, nor bound by it, are also said to be strangers to the covenant."

To the same effect, see *O'Donnell v. McIntyre*, 118 N. Y. 156

In *Theller v. Hershey*, 89 Fed. 575, 576, Judge Hawley says:

“Parties include, not only those whose names appear upon the record, but all others who participate in the litigation by employing counsel, or by contributing towards the expenses thereof, or who, in any manner, have such control thereof as to be entitled to direct the course of proceedings therein. Thus, it is said in 3 Rob. Pat. Sec. 1176: ‘Where several defendants, by agreement, contest one of the actions in their joint behalf, all become thereby parties to the suit, and are equally concluded by the judgment.’ *The law is well settled that parties and privies include all who are directly interested in the subject matter*, and who had the right to make defense, control the proceedings, examine and cross examine witnesses, and appeal from the judgment.”

United States & Foreign etc. Co. v. Asbestos Felting Co., 4 Fed. 816

Miller v. Tobacco Co., 7 Fed. 91, 93

Claflin v. Fletcher, Id. 851

American Bell Tel. Co. v. Nat'l Tel. Co., 27 Fed. 663, 665

Eagle Mfg. Co. v. David Bradley Mfg. Co., 50 Fed. 193, 195, Id. 6 C. C. A. 661, 57 Fed. 980, 990, and authorities there cited.

Lovejoy v. Murray, 3 Wall. 1, 18

Robbins v. Chicago City, 4 Wall. 657, 672

Walk. Pat. (2nd Ed.) Sec. 468

In *Cole v. Favorite*, 69 Ill. 457, 460, the court says:

“The suit in the Federal court, although in the name of the appellee, was prosecuted at the request of and for the benefit of appellant. He advised and directed it, *was a witness therein, and while he was not formally a party to the record, he was a party in interest, and must be regarded a privy.*”

And so here, Ben Holladay was president of the Oregon & California Railroad Company, and in the name of that company joined in the answer in defense against the claims made by the plaintiffs in the Nightengale case. Not only did he act as president of the company in that respect, but the very issues involved his own personal interests and the good faith and honesty of the transfer of stock to him by the Oregon Central Railroad Company, and the settlement of the affairs of Ben Holladay & Company with the Oregon Central Railroad Company, and the transfer of the Oregon Central Railroad Company to the Oregon & California Railroad Company; and Ben Holladay submitted his affidavit particularly supporting the defense made in this answer; that affidavit appears set out at length at pages 1475 to 1508 Transcript.

At this point the attention of the court is particularly called to this affidavit, Complainants Exhibit 52, beginning at page 1475 Transcript. In

that affidavit, in so far as the same is material, Ben Holladay swore:

“That I am at the present time the owner and holder of 134,996 shares of such capital stock, that is to say, I am now and was at the commencement of this suit, the bona fide owner and holder of 134,996 shares of the capital stock of the said Oregon and California Railroad Company. * * * I admit and state the fact to be, and so it is, that on or about the 7th day of September, A. D. 1869, said Oregon Central Railroad Company, defendant herein, did, acting by and through its then Board of Directors, each and all of whom acted fairly and in good faith, and according to their best judgment, and without any confederation, collusion or fraud, and for a valuable and adequate consideration, cause to be issued and delivered to this affiant and in his name, 39,930 shares of the capital stock of the defendant, The Oregon Central Railroad Company. I deny that on and prior, or on or prior to the 7th day of December, 1869, or since, I had by various devices or contrivances, or by any device or contrivance, become possessed of all the shares, or that there was standing in my name and in the names of any confederates of mine, all the shares of the capital stock of said Oregon Central Railroad Company, except the number of shares particularly enumerated and specified in Schedule “F” attached to complaint herein. * * * *

"I admit that in March, 1870, the capital stock of the Oregon Central Railroad Company was cancelled by the stockholders and directors of that company, to-wit, *on the 28th and 29th days of March, 1870*, at the date of the dissolution of such company, as will more fully appear from other portions of this affidavit.

* * *

"I deny that the proceedings of said stockholders meeting held March 28th, 1870 (Pages 424-435 Transcript) or at any other time, or of said directors, in causing the execution of said indenture referred to in subdivision 17th of complaint, were dictated or controlled by me, or that each and every, or any of the stockholders present at said stockholders meeting voted in favor of said sale or transfer at the request of or at the dictation of myself, or as my tools or confederates. I admit that it was the common judgment of all said stockholders and directors, and myself, that such proceeding then had was for the best interests of all concerned in said Oregon Central Railroad Company. * * *

"I deny that the said Oregon and California Railroad Company has not paid any money or other valuable thing for said sale and transfer, but I aver and state the fact to be, that said Oregon and California Railroad Company has paid all debts and liabilities of said Oregon Central Railroad Company, and caused all its

obligations to be surrendered and cancelled, to-wit, an indebtedness of over \$800,000. *

* * *

“That said 3700 shares of stock now claimed by said Nightengale has never been transferred on the books of the said Oregon Central Railroad Company, but were on the 28th day of March, 1870, yet standing on said books in the name of A. J. Cook, *at which time said Oregon Central Railroad Company was legally dissolved* by a vote of two-thirds of all its stock at a meeting duly and legally called for such purpose, at the office of the company in Salem, Oregon, the object of such meeting having been stated in the notice calling the meeting, which notice was duly and legally given as required by law, and the by-laws of the said company, and at which time and place the contracts between the Oregon Central Railroad Company and A. J. Cook and A. J. Cook & Co. were legally cancelled by said company and the assignees of said contracts. And that a copy of the resolution passed by the directors of the Oregon Central Railroad Company calling such meeting of the stockholders of said company to meet on said 28th day of March, 1870, for the purpose of determining the propriety of and authorizing the dissolution of such corporation, the settling of its business, disposing of its property and the division of its capital stock, and also a copy of the notice for such meeting, which notice was published by the said corporation as in and by said resolution provided

will be found at large on page 305 of said Exhibit attached to complaint herein. That at such meeting of the stockholders, and in pursuance of such notice, the sale of all its property was made for the purpose and in the manner and for the reasons as will more fully appear by the recitals in said deed of conveyance, a copy of which is given upon pages 298 to 311, inclusive, in said exhibit attached to complaint herein, and said Oregon Central Railroad Company was then duly and legally dissolved and all its stock legally cancelled in strict compliance with the provisions of the statutes of Oregon in such cases made and provided, as I am by my counsel advised, and as I verily believe, all of which proceedings were ratified and confirmed by the *directors of the said Oregon Central Railroad Company at a meeting duly called and legally held at the office of the company on the same day.* * *

* * And the whole thereof was on said 28th and 29th days of March, 1870, legally cancelled by the stockholders and directors of said defendant, The Oregon Central Railroad Company, as and by virtue of the proceedings then had and recitals from the record of which will more fully appear in the copy of deed of transfer from the Oregon Central Railroad Company, defendant, to the Oregon & California Railroad Company, defendant, in the exhibit attached to plaintiff's complaint herein, and which copy of deed is referred to by me and made a part of this my affidavit.

“I further state the fact to be that the plaintiff, Simon G. Elliott, was present at the meeting of the Board of Directors on Sept. 7, 1869, and had full knowledge of the proceedings then had, by which said 39,930 shares of the stock of the said Oregon Central Railroad Company was issued to this affiant, and he, said Elliott, plaintiff herein, consented to such proceedings and aided in them. I further state that it was the intention at the time, both of the directors of said company, and of the firm of Ben Holladay & Company, that said 39,930 shares of stock should be issued to Ben Holladay & Company, but through some inadvertence or mistake of the secretary or other parties, said stock was directed to be issued and was actually issued to myself. Upon the discovery of which afterwards I immediately transferred the same to Ben Holladay & Company, upon the books of the company. * * *

“I deny that said 39,930 shares of stock or any part thereof were issued without any consideration moving from me. I deny that the same were issued to me with any intent or design of enabling me to carry out any scheme or contrivance for my own benefit, or as alleged in complaint, but I aver the sole object of purchasing said stock was in hopes of giving thereby credit and salability to the bonds of such company.”

This affidavit was subscribed and sworn to before Ralph Wilcox, Clerk, on the 22nd day of June, 1871, and filed with the exhibits attached to and made

a part of the affidavit of Ben Holladay, as Complainant's Exhibit 52, and, as Exhibit 21 (Nightingale case) (Complainant's Ex. 53), there was a stipulation of the parties, the material and important part of which reads:

"To save the expense of proving the originals of the Exhibits hereinafter mentioned, and hereto attached, *the parties having had an opportunity to compare such exhibits with the originals, and now being satisfied that the same are true copies of the originals* of which they purport to be copies, it is hereby stipulated and agreed between the complainants in the above entitled suit, by W. H. Effinger, their attorney and solicitor, and the defendants, by Dolph, Bronaugh, Dolph & Simon, their attorneys and solicitors, * * * *

"8th. That Exhibits No. 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 hereto attached, which are the same as Exhibits F, G, H, K, L, M, N, O, P, and R of the answer herein, are true and correct copies of what they respectively purport to be, to-wit:

"*Exhibit No. 9.* Partial minutes of the proceedings of the meeting of the Board of Directors of the Oregon Central Railroad Company of Salem, of *March 28th, 1870*, and of *the communication of Ben Holladay & Co.*, and of resolutions of the Board of Directors, passed at said meeting.

“Exhibit No. 10. Conveyance of Ben Holladay & Co. to the Oregon Central Railroad Co. of Salem.

“Exhibit No. 11. Of an agreement between the Oregon Central Railroad Co. of Salem, and Ben Holladay & Co.

“Exhibit No. 12. Of the minutes of the proceedings of a directors meeting of said Oregon Central Railroad Company of Salem, held March 14th, 1870, at seven o'clock P. M.

“Exhibit No. 13. Of a notice given and published to stockholders of the Oregon Central Railroad Company of Salem, of a meeting of stockholders of said company to be held March 28, 1870, at 7 o'clock P. M.

“Exhibit No. 14. Of the minutes of the proceedings of a meeting of the Board of Directors of the Oregon Central Railroad Company of Salem, held March 28, A. D. 1870, at the office of the company at Salem, Oregon.

“Exhibit No. 15. Of the official record of the minutes of the proceedings of the special meeting of the stockholders of the Oregon Central Railroad Company of Salem, held *March 28th*, A. D. 1870, at 7 o'clock P. M.

“Exhibit No. 16. Of an agreement entered into the 28th day of March, 1870, between the Oregon Central Railroad Company of Salem, and the Oregon and California Railroad Company.

“Exhibit No. 17. Of the recorded minutes of the proceedings of an adjourned meeting of the Board of Directors of the Oregon Central Railroad Company of Salem, held at the office of the company at 4 o'clock P. M. of March 29th, 1870.

“Exhibit No. 18. Of minutes of the proceedings of an adjourned meeting of the stockholders of the said Oregon Central Railroad Company of Salem held at the office of the company at 3 o'clock P. M. of March 29th, 1870, and that each of said Exhibits may be offered, received and read in evidence in this suit upon the trial thereof, upon appeal and upon any hearing therein, with the same force and effect and subject only to such objections for immateriality as might be made to the original minutes and agreements of which the same are copies if duly proved and offered in evidence. (Transcript pages 1508-13)

Exhibit “G” is the same as *Exhibit No. 10*, and is the conveyance of date March 28, 1870, executed by Ben Holladay, C. Temple Emmet, by Ben Holladay, Attorney in Fact, and by Ben Holladay & Co., by Ben Holladay, and set out fully in the minutes of the Oregon Central Railroad Company, Complainant's Exhibit 7. This Exhibit 21, with Exhibit 10 attached thereto, the same being Exhibit 21 to the testimony taken before W. B. Gilbert, Examiner, in that case, is certified by G. H. Marsh, Clerk of the United States Circuit Court, to be a

correct transcript from the original exhibits on file in that case. The signature of Ben Holladay to the affidavit of June 22, 1871, was proven before the original was offered, afterwards the original was withdrawn and a certified copy submitted, and the same appears fully set out in the Transcript at pages 1475 to 1515.

We have quoted at length from this affidavit of Ben Holladay for two purposes. *First*, to show his knowledge of all that transpired at the meetings of the Directors and stockholders of the Oregon Central Railroad Company on March 28, 1870, and that he was present and participated in that meeting as the principal stockholder of the Oregon Central Railroad Company, thereby making the minutes of that meeting competent evidence, not only of the action of the Oregon Central Railroad Company, but of the action of Ben Holladay and Ben Holladay & Company, and, under all the authorities, making such minute book clearly admissible.

We have also quoted from this affidavit of Ben Holladay for the purpose of showing that in substance and effect he was the actual party litigant in the Nightengale case, and that his action and the action of the Ben Holladay & Company, through him, in disposing of the physical properties of Ben Holladay & Company, including the lands involved in this suit, to the Oregon Central Railroad Com-

pany, under an agreement by which the Oregon Central Railroad Company was to pay Ben Holladay & Company \$800,000, which was to be assumed and paid by the Oregon & California Railroad Company, and the Oregon Central Railroad Company dissolved,—were acts which were involved in the Nightengale case, and that he was not only directly interested, but necessarily involved.

The case of *Cole v. Favorite*, 69 Ill. 457, is followed in *Bennett et al. v. Star et al.*, 119 Ill. 9, 15; see also *Hill v. Bayne*, 15 R. I. 75, same case, 2 Am. St. Rep. 873, note p. 877; also

Blake v. Griswold, 103 N. Y. 423

3 Cook on Corporations, 6th Ed. Sec. 727, p. 2380 and notes.

Olney v. Chadsey, 7 R. I. 224, 227

Sigua Iron Co. v. Brown, 171 N. Y. 488, 496

Even where, as under some of the authorities, it is held that the books of a corporation are not admissible in evidence to prove a contract made with one of the shareholders in his individual capacity, *it is held without exception that where the shareholder was present at the meeting, and participated in the transaction, that he is bound by what was done, and the minutes of the meeting are admissible, not only to prove the corporate action, but to prove the action of the participant.* The better rule, however, is, as we think, that the minute books in the absence of a statute expressly making such minute

books primary evidence of what transpired, are competent evidence to show corporate action, and especially where a stockholder or third person submits for acceptance a proposition, and the minute books show that fact, and show that the corporation acted upon the proposition, and accepted the same. The corporate action cannot be shown without at the same time showing the contract made by its action upon the proposition submitted.

The case of *Carey v. Williams*, 79 Fed. 906, followed in *Sigua Iron Co. v. Green*, 104 Fed. 854, is not applicable to a case where, as here, the stockholder or third person,—in this case Ben Holladay and Ben Holladay & Company,—is shown to have been present at the Directors and stockholders meetings, to have participated in the same, and to have controlled all of its proceedings.

The case of *Rankin v. Fidelity Trust Co.*, 189 U. S. 242, 252, citing *Carey v. Williams*, 79 Fed. 906, and *Sigua Iron Co. v. Green*, 104 Fed. 854, is not applicable to the facts in the case at bar. In that case the court says:

“As it does not appear who made this memorandum, when or for what purpose it was made, or what it was intended to indicate, it was properly excluded from the consideration of the jury. It was probably explanatory of the fact that correspondence with regard to Hand’s account was kept up with the defend-

ant company. It had no tendency, however, to show anything inconsistent with defendant's position as pledgee of the stock. As the stock stood in Hand's name, the entry had no tendency to prove ownership in another."

That is the extent and the whole extent of that case. The effect of a statute such as Sections 695, 790, 6691 and 6694 Lord's Oregon Laws was not considered or determined in *Hayden v. Williams*, 96 Fed. 279; nor in *Carey v. Williams*, 79 Fed. 906; nor in *Trainor v. German-American Bldg. Ass'n.*, 204 Ill. 616; nor in *Fleming v. Reed*, 77 Conn. 563.

In *Brewer v. Stone*, 11 Gray, 228, 231, it was contended that the books of the corporation should not have been admitted in evidence against the defendant. The books were offered to prove the *acceptance* of certain deeds of conveyance from Brewer and Baldwin to the company, and it was there held that the book of records was competent evidence for that purpose. To the same effect see *Harrison v. Morton*, 83 Md. 456.

That these minute books were admissible upon the ground that they constituted admissions on the part of Ben Holladay and Ben Holladay & Company, who were shown to be present at the meeting, and participating therein, by the affidavit of Ben Holladay, is elementary.

First Nat'l Bank v. Tisdale, 84 N. Y. 655
 Jones on Evidence, Sec. 518, 2nd Ed.

Sigua Iron Co. v. Greene, 88 Fed. 207-217,
 holding that the minutes were competent
 evidence to show the *knowledge* of the
 party and his acquiescence.

It is contended by counsel for appellee that the timber was removed from these lands prior to the time the legal title was conveyed to Ben Holladay & Company. This, if material, is not in accordance with the facts. The attention of the court is called to the fact that these tracts were cash entries, (Page 88 Transcript) and that in the winter of 1869, or in the Fall of that year, after the legal title to these lands was conveyed to Ben Holladay & Company, A. M. Elam testifies, (Pages 89, 92 Transcript) that he was hauling from the mill on these premises; that the road had not been completed; that they were grading and putting the ties down; that at the time he was hauling there was quite a lot of timber on the land. He was asked the direct question, "Mr. Elam, was the timber practically all cut off at the time you were there?" Answer: "No." (Page 97 Transcript)

It appears also in the evidence that Gardner Elliott was a brother of S. G. Elliott, and was interested in the contract under which the road was being constructed, and therefore had an interest in the firm of Ben Holladay & Company. The son of

Gardner Elliott was called as a witness in this case. He testified, (Page 173 Transcript) that the land was bought for the purpose of getting the timber and ties for the railroad; that his father built the mill, (Page 178 Transcript) and that it was for Ben Holladay & Company, and that the timber and ties were used for constructing the railroad; that his father lived on this land until all the timber was cut, (Page 180 Transcript) and that the mill was dismantled, that his father told him they were going to move the mill, and where they were going to move it to, and that the mill was turned over to George W. Weidler. (Page 188 Transcript) That this mill was operated as late as June, 1869, is shown by the pay rolls introduced in evidence. (Page 195 Transcript)

J. T. APPERSON testified, (Pages 673-678 Transcript) that this mill was operated about two years while they were hauling ties from there to the railroad, and that after the timber had been practically devastated the mill was torn down from its location and moved to Canemah and set up there, and for a number of years *was operated in the interest of the railroad company* in cutting ties and timber for the Oregon and California Railroad, and was operated by Gardner Elliott.

This not only shows that the mill was operated on these premises until after the completion of the

road, but that after the timber was cut, the mill was moved to Canemah, presumably by the Oregon & California Railroad Company, and operated by that company,—clearly showing a manual, physical delivery of this property to the Oregon & California Railroad Company, thus described and identified by this mill. Furthermore, *these deeds which were muniments of title conveying the property to Ben Holladay & Company by James Grindley and Gardner Elliott*, appear to have been in the possession of the Oregon Central Railroad Company and the Oregon & California Railroad Company from and after March 28, 1870, and it appears that the property has been continuously claimed by the Oregon & California Railroad Company, in the possession of the United States Circuit Court, when R. Koehler was Receiver, listed as such, and as an asset of the Oregon & California Railroad Company, and continuously claimed from March 29, 1870, down to date. Ben Holladay testified that these lands belonged to Ben Holladay & Company at one time, (Page 875 Transcript) and the testimony of Ben Holladay, wherever admitted, shows conclusively that after March 28, 1870, Ben Holladay & Company had no interest in this property, and that Ben Holladay parted with all of his interest, and the interest of his firm, at that time.

An application of the law to the facts of this case is not difficult or complicated. Attention is called

to the appendix to this brief, showing certain important dates, when certain events occurred which are material to the consideration of this case.

The substance of the formal agreement of March 28, 1870, set out in the bill of complaint, and shown in the minute books of the Oregon Central Railroad Company, Complainant's Exhibit 7, is contained in the proposition of Ben Holladay & Company submitted by them on that date, and accepted by the company on that date, and is shown in the agreement signed by Ben Holladay & Company and the Oregon Central Railroad Company on that date, which are shown to have been adopted or acted upon by the Oregon Central Railroad Company when Ben Holladay was present and acting not only as the majority stockholder, but acting for Ben Holladay & Company. If for any reason the so-called conveyance set out in the bill of complaint should be deemed for any reason inadmissible, or not proven, the case of plaintiff is sufficiently made out, under the pleadings, by the other facts shown by these minutes, and the complaint is sufficiently broad to entitle the plaintiff to a decree, disregarding the formal conveyance of March 28, 1870.

Counsel for appellee cite authorities to the effect that a deed made to Ben Holladay & Company conveys the legal title to Ben Holladay. This is not the rule in Oregon, nor is it the rule under the weight of authority. In *Kelly v. Bourne*, 15 Or.

476, it was decided that under the deeds made to a partnership, the title to the lands in equity belonged to the partnership, and that the lands were partnership property, to be dealt with as such. In *Adams v. Church*, 42 Or. 270, it was held that a conveyance of real estate to a partnership passed the title to the individual members of the firm, as tenants in common. This is a rule of property in the State of Oregon, and will be followed by this court. Furthermore, Complainant's Exhibit 7 shows that Ben Holladay & Company, acting by Ben Holladay, made the contract with the Oregon Central Railroad Company for the transfer of these lands, and also that Ben Holladay was to join, and did join, therein. As to the description of the lands, the documents all show that the agreement was to operate upon all property of every kind, real or personal, where-soever situated, standing in the name of Ben Holladay & Company in the State of Oregon. There can be no sort of doubt but that this property was intended to be transferred by Ben Holladay & Company, and by Ben Holladay, to the Oregon Central Railroad Company, for the purpose of transferring it, with the railroad, to the Oregon & California Railroad Company.

Counsel for appellee makes the contention that these lands involved in suit are not sufficiently identified by the agreement sought to be shown by the minute book, Complainant's Exhibit 7, so as to

bring them within the terms of that agreement. A careful reading of the proposition of Ben Holladay & Company submitted to the Oregon Central Railroad Company on March 28, 1870, and acted upon and accepted by that company on that date, followed by the formal agreement executed by Oregon Central Railroad Company and Ben Holladay & Company, clearly identifies these lands as the lands intended to be covered by the agreement. The agreement calls for a conveyance of all the property standing in the name of Ben Holladay & Company, or owned by Ben Holladay & Company, in Oregon. It is further identified by reference to the term "mills," and the oral testimony taken in this cause clearly shows that one of these mills was located upon these lands, and that the timber from these lands was manufactured into material for the railroad, and delivered in the performance of the contract assumed to be performed by Ben Holladay & Company, which was to be cancelled, and was cancelled, under the agreement of March 28, 1870, as evidenced by the minutes of that company, and as shown by all the proceedings in the Nightengale case; and as shown by the original agreements produced by J. C. Moreland, Clerk of the Supreme Court, and by him identified as cancelled. (See testimony of J. C. Moreland, pages 867, 868 Transcript; also Exhibit 21 in the Nightengale case, pages 1155-1172 Transcript)

ULTRA VIRES.

It is also claimed by counsel for appellee that the contract, even if proven, was ultra vires. In addition to the authorities cited by us in the original brief, it is a fundamental rule that the invalidity of contracts made in violation of statutes, or in excess of the charter powers of a corporation, is subject to the equitable exception that although a corporation in making a contract acts in disagreement with its charter, where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of an agreement cannot be permitted in an action founded on it, to question its validity.

See 4 Ency. of U. S. Sup. Ct. Rep. 755, and authorities cited in note 63.

In this case Ben Holladay & Company and Ben Holladay received the benefits of the agreement claimed to be ultra vires. Those who receive benefits under such contracts are clearly estopped and cannot be heard to question the validity of the contract, or to assert that it is or was ultra vires, and those in privity with Ben Holladay, or Ben Holladay & Company, as the defendant here is, are clearly bound by such estoppel.

But it is not conceded that a contract by which the Oregon Central Railroad Company, on March

28, 1870, undertook to make a settlement with Ben Holladay & Company, its contractors, engaged in the performance of a contract for the construction of its road, is ultra vires, or in violation or in excess of the powers conferred upon the Oregon Central Railroad Company by its charter, under Section 6686, Lord's Oregon Laws. By subdivision 4 of that section, it is expressly provided that a private corporation organized as was the Oregon Central Railroad Company, has power, (2) "to contract and be contracted with;" (4) "to purchase, possess and dispose of such real and personal property as may be necessary conveniently to carry into effect the objects of the incorporation, and to take, hold, and possess and dispose of all real and personal property donated to such corporation by the United States or by any state, territory, county, city, or other municipal corporation, or by any person, firm, association, or private corporation, for the purpose of aiding in the objects of such corporation."

In this instance the Oregon Central Railroad Company was insolvent, and was indebted to Ben Holladay & Company in a large sum of money, as shown by the record, approximately \$800,000, and the contract under consideration was made for the purpose of making a settlement with Ben Holladay & Company, and for the purpose of winding up the corporate affairs of the Oregon Central Railroad Company, and disposing of all of its property, to-

gether with the property which Ben Holladay & Company had used and had found it necessary to use in the performance of their construction contract with the Oregon Central Railroad Company.

Under all of the authorities such a contract would not be ultra vires, but would be reasonably incident to the performance of its contracts and the discharge of the same, and was in furtherance of the public policy looking towards the reorganization of the Oregon Central Railroad Company, by Ben Holladay & Company, and Ben Holladay, the then principal stockholder of the Oregon Central Railroad Company; and to effect such reorganization in the name of the Oregon & California Railroad Company.

Counsel for appellee has cited numerous cases to the effect that contracts which are ultra vires, and which are not executed, will not be enforced; that such contracts are void. Such is the general rule as announced by the Supreme Court of the United States in the cases cited by counsel, pages 186 to 188 brief of appellee. We do not question the rule, but deny its application to the facts in the case at bar. The contract in this instance has been fully executed upon the part of the Oregon Central Railroad Company, and the purchase price received by Ben Holladay & Company, and nothing remains but to perpetuate the evidence of that contract, and to

quiet title of the Oregon & California Railroad Company as against the claim of anyone claiming under Ben Holladay or Ben Holladay & Company.

3 Thompson on Corporations, Sec. 2788, 2nd Ed. note 21, and authorities cited.

G. V. B. Mining Co. v. First Nat'l Bank, 95 Fed. 23, 34 (C. C. A. 9th Ct.)

U. S. Savings & Loan Co. v. Convent of St. Rose, 133 Fed. 354 (C. C. A. 9th Ct.)

Jacksonville etc. Ry Co. v. Hooper, 160 U. S. 514-524

Mr. Justice Shiras, speaking for the court in the case last cited, says:

“But we think the present case falls within the language of Lord Chancellor Selborne, in Attorney General v. Great Eastern Railway, 5 App. Cas. 473, 478, where, while declaring his sense of the importance of the doctrine of ultra vires, he said: ‘This doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not, unless expressly prohibited, to be held, by judicial construction, to be ultra vires.’”

We think we have demonstrated the following propositions:

(1) That the Assignments of Error sufficiently

state or specify particularly as reasonably practicable, in what the decree is alleged to be erroneous.

(2) That the Specifications of Errors relied upon are in accordance with the rule.

(3) That the minute books of the Oregon Central Railroad Company are admissible, and competent evidence to show the corporate action of that company on March 28, 1870, and that these minutes show a contract between the Oregon Central Railroad Company and Ben Holladay & Company and Ben Holladay, whereby Ben Holladay & Company and Ben Holladay agreed to transfer and convey the property described in the complaint, to the Oregon Central Railroad Company, and evidence that agreement by a formal written proposition accepted by the company, and a formal agreement executed by the parties, and a conveyance set out. (See Complainant's Exhibit 7.)

(4) That these minutes were also admissible as proof of ancient possession under color of title, and being more than thirty years old, and produced from the proper custodian, were admissible in evidence as ancient documents, and were sufficient upon which to predicate color of title and possession thereunder.

(5) That these minutes thus evidence an agreement to convey all the real property of Ben Holladay & Company and Ben Holladay, situated in the

State of Oregon, and especially in Multnomah and Clackamas Counties, which is certain and definite. (Point III, pages 26 and 27, original brief.)

(6) That a deed executed to Ben Holladay & Company conveys the legal title to the partners as tenants in common, and vests this title in the individual members, subject to the equitable rights of the partnership. (Points V and VI, pages 28 to 32, original brief.)

(7) That the plaintiff is the owner in fee simple of the premises described in the complaint, by reason of the operation of the statute of limitations. (Point VII, pages 33, 34, original brief.)

(8) That the instrument of date March 28, 1870, set out in the minute book of the Oregon Central Railroad Company, Complainant's Exhibit 7, is valid and admissible in evidence, for the reason that it is sufficiently stamped as a simple contract; but, if not sufficiently stamped, it is not shown to have been insufficiently stamped with intent to evade the provisions of the Revenue Act.

(9) That Ben Holladay was a quasi party to the Nightengale case, and was bound by all that was done therein, and was bound particularly by his own affidavit, and the answer of the defendant in that case, and the stipulation of counsel exhibiting the original agreement of March 28, 1870, and stipulat-

ing that Exhibits "G" and 10 of that record are true copies of the original.

(10) That the defendant Maria de Grubissich is in privity with her ancestor, and bound by any act, acquiescence, or thing done or omitted by Ben Holladay, and that she is not, nor was Ben Holladay, a stranger, within the meaning of the rule.

(11) That the real premises described in the complaint belonging to Ben Holladay & Company prior to March 28, 1870, were acquired by that firm for use in the performance of their contracts with the Oregon Central Railroad Company, for the construction of its railroad.

(12) That under the Frankfort Committee agreement of February 29, 1876, Clause 8 thereof, Ben Holladay obligated himself to convey these premises, or any others which had not been fully or sufficiently conveyed, to the Oregon & California Railroad Company, and that this covenant is binding upon the defendant.

(13) That the agreement by which Ben Holladay & Company and Ben Holladay agreed to convey these premises to the Oregon Central Railroad Company is not ultra vires, but one incidental to the powers granted to the Oregon Central Railroad Company by law.

(14) That a presumption will be indulged in this case that a valid and sufficient grant or conveyance has been made of these premises, even though the statute of limitations may not have fully run. (See Point VII, pages 204-209 original brief.)

(15) That the defendant will be presumed to have acquiesced in the transfer of this property to plaintiff, and in the possession of plaintiff, and that her claim in that respect is stale and barred by her own laches and delay, and by the laches, acquiescence and estoppel binding upon her ancestor, Ben Holladay.

(16) That assumption of possession of this property by the Oregon & California Railroad Company, the possession of the Receiver, the possession of the deeds or muniments of title, the continued payment of taxes from 1873 to 1910 inclusive, the use of the premises by the Oregon & California Railroad Company, and the evidence of old fences, and the construction of new fences, are such acts of open, notorious, exclusive and adverse possession as would put an owner on inquiry and knowledge, and put the statute of limitations in effect; and that by reason thereof, the defendant is barred of all right, title or interest in the premises.

(17) That under Section 516 Code, this cross complaint can be maintained where, as here, the plaintiff is alleged to be and is admitted to be in

possession, and where the defendant claims an interest or estate therein. (Page 231 original brief.)

(18) That the equities are with the complainant, and that the claim of the defendant is unconscionable, inequitable, and unjust, and asserted after forty years of acquiescence, waiver, and delay.

CONCLUSION.

This is a case where Maria de Grubissich, granddaughter of Ben Holladay, asserts title to the real premises in question, where Ben Holladay, as well as Ben Holladay & Company, have agreed to convey them to the Oregon Central Railroad Company, and which were subsequently attempted to be conveyed by a formal agreement of March 28, 1870, in accordance with the preliminary agreement theretofore and on that date executed, as evidenced by the minutes, Complainant's Exhibit 7, and which were on the next day conveyed to the Oregon & California Railroad Company by the procurement and under the direction of Ben Holladay, the active, controlling and moving spirit of the Oregon Central Railroad Company, of Ben Holladay & Company, and of the Oregon & California Railroad Company. More than forty years have elapsed since these transactions were had and recorded. Ben Holladay and all the immediate parties are dead. This action in ejectment was commenced, as shown by the records, on March 11, 1911, and is being prosecuted by a former executive officer of the Oregon & California Railroad Company, who obtained official knowledge of the defective record title to these premises as early as 1905, and who was asked to discontinue his services with the Oregon & California Railroad Company, and who did discontinue his services as such executive officer, on July 1, 1910. (Page 912 Trans-

cript) Allusion is made to this fact because it raises an inference that Maria de Grubissich must have supposed that these premises had been properly conveyed to the Oregon Central Railroad Company by her grandfather, Ben Holladay, or she would long prior to March 11, 1911, have asserted some claim or sought to recover the same. It goes to the claim of ownership on her part, and supports the presumption urged by us in our original brief, that some deed or conveyance had been executed by Ben Holladay & Company to the Oregon Central Railroad Company, and this presumption will be indulged, notwithstanding the statute of limitations may not have run, where the period of time, and other circumstances attending the same, justify such presumption. The court would be justified *in presuming that the contract of March 28, 1870, formally executed by Ben Holladay and Ben Holladay & Company, had been executed, without any proof* to that effect, and the action of Marie de Grubissich *in delaying her action in ejectment, in failing to pay any taxes upon these lands, or in asserting any claim of ownership, coupled with the claim of ownership by the Oregon & California Railroad Company, its payment of taxes since 1873 up to date, its enclosure by fence, its assertion of ownership in all ways that this property could be conveniently used,—all these things show beyond any sort of doubt that Maria de Grubissich, if she ever*

knew anything about these lands, must have supposed that they were disposed of by her grandfather and Ben Holladay & Company, and that therefore she made no claim to them.

If Ben Holladay was now here, a party seeking to recover these lands as against a bona fide purchaser of the lands from the Oregon & California Railroad Company, who had gone into possession and improvement of these premises, or who had done no more than the Oregon & California Railroad Company has done, we respectfully submit that this court, under the facts in evidence in this case, would consider that his act in asserting such claim was contrary to the plainest principles of equity and right. If Ben Holladay could not successfully assert any claim to these premises, under the circumstances, by what right, in law or equity, can his devisee maintain any claim or assert any equity or title to these premises? Ben Holladay and Ben Holladay & Company received \$800,000 for the property of the Oregon Central Railroad Company, including the property standing in the name of Ben Holladay & Company. This was the consideration exacted by him from the two companies which he dominated and controlled. He litigated with his partners in the partnership suit begun in 1869, and terminated in 1879, the rights, liabilities and assets of that partnership. Nowhere in that record was there ever any claim made, on final decree or other-

wise, that these lands were the individual property of Ben Holladay, and therefore not subject to partnership claims.

It will be observed that although the suit for dissolution was begun in 1869, while Ben Holladay & Company were performing the contracts with the Oregon Central Railroad Company, and using these very lands and the timber growing thereon for that purpose, on decree of final dissolution in 1879, these lands were not treated as belonging to Ben Holladay & Company, for the reason that they were conveyed, or agreed to be conveyed, by Ben Holladay & Company to the Oregon Central Railroad Company on March 28, 1870. Furthermore, the affidavit of Ben Holladay, and his testimony in the record, show that he did not at any time after March 28, 1870, make any claim to these lands, or make any claim that Ben Holladay & Company owned them or any part of them.

For these reasons, and for the reasons urged in our original brief, we respectfully submit that the decree of the court below should be reversed, and a decree entered here, as prayed for in the bill of complaint.

WM. D. FENTON,
BEN C. DEY,
ALFRED P. DOBSON and
KENNETH L. FENTON,
Attorneys for Complainant-Appellant.

APPENDIX

DATES OF EVENTS CHRONOLOGICALLY ARRANGED.

April 22, 1867, Oregon Central Railroad Company of Salem incorporated.

April 23, 1867, Oregon Central Railroad Company of Salem entered into contract with S. G. Elliott and A. J. Cook for construction of first 150 miles. (Pages 884-890 trans.)

May 20, 1867, S. G. Elliott assigned 7/20 of these contracts to one Perrin, and formed a partnership with him under the name of A. J. Cook & Co.

May 29, 1867, S. G. Elliott assigned 1/10 of these contracts to one Flint.

Nov. 27, 1867, Oregon Central Railroad Company and A. J. Cook & Co. modified contract.

March, 1868, S. G. Elliott assigned 2/20 of these contracts to one Brooks.

March, 1868, S. G. Elliott assigned 1/20 of these contracts to one Gardiner Elliott.

April, 1868, S. G. Elliott assigned 7/20 of these contracts to one Frohman.

May 2, 1868, A. J. Cook assigned his interest in the contract of April, 1867, to S. G. Elliott.

May 12, 1868, S. G. Elliott, acting for A. J. Cook & Co., made contract with Oregon Central Rail-

road Company for the construction of balance of road from 150 mile point to California state line.

Sept. 12, 1868, Ben. Holladay, C. Temple Emmet and S. G. Elliott formed the firm of Ben Holladay & Co., to take over these contracts and perform same; Holladay owning 24/40, C. Temple Emmet 10/40 and S. G. Elliott 6/40 thereof.

May 4, 1869, James Grindley conveyed to Ben Holladay & Co. for \$187.39, 149.81 acres; deed recorded *July 24, 1869*, page 179, Book "G".

Sept. 7, 1869, Communication from Ben Holladay & Co. to Oregon Central Railroad Company. (Page 379 trans.)

Sept. 7, 1869, 39,930 shares of Oregon Central Railroad Company's stock directed to be issued to Ben Holladay. (Page 385 trans.)

Oct. 5, 1869, Gardiner Elliott conveyed to Ben Holladay & Co. for \$200.00, 80 acres; deed recorded *October 16, 1869*, page 239, Book "G".

Nov. 5, 1869, Ben Holladay and C. Temple Emmet commenced a suit to dissolve the partnership of Ben Holladay & Co. against S. G. Elliott, Gardiner Elliott, Thaddeus R. Brooks and J. B. Rogers.

Dec. 25, 1869, First 20 miles completed to a point near Parrott Creek, beyond Oregon City.

March 14, 1870, Directors of Oregon Central Railroad Company called a meeting of its stockholders for March 28, 1870, to dissolve the corporation. (Page 391, trans.)

March 17, 1870, Oregon and California Railroad Company incorporated.

March 28, 1870, Ben Holladay & Co. made a settlement with Oregon Central Railroad Company. (See complainant's Ex. 7.)

March 28, 1870, Ben Holladay & Co. made a written proposition to Oregon Central Railroad Company for transfer of all of the property of Ben Holladay & Co. for surrender and cancellation of these contracts upon payment of \$800,000.00. (See complainant's Ex. 7.)

March 28, 1870, Oregon Central Railroad Company accepted the proposition of Ben Holladay & Co. and adopted proper resolutions authorizing the Directors to dissolve the corporation, dispose of its assets, and settle up its business. (Pages 397-402 Transcript)

March 28, 1870, Oregon and California Railroad Company submitted a proposition to the Oregon Central Railroad Company to purchase the railroad of the latter, including all its property, and to pay therefor \$800,000.00.

- March 28, 1870, Ben Holladay & Co. submitted to Board of Directors of Oregon Central Railroad Company written proposition containing offer to convey to that company all of the property of Ben Holladay & Co. and all of the property of Ben Holladay & Co. standing in their name wherever situated. (Pages 393-397 trans.)
- March 28, 1870, Proposition of Ben Holladay & Co. accepted. (Page 401 trans.)
- March 29, 1870, Oregon Central Railroad Company conveyed its railroad and its properties involved in this suit, with other properties, to the Oregon and California Railroad Company.
- April 18, 1870, Deed from Oregon Central Railroad Company to Oregon & California Railroad Company recorded at pages 1 to 23, Book "H". Taxes paid as alleged, \$1773.79. Improvements made \$500.00.
- Sept. 27, 1875, Ben Holladay made his will bequeathing his residuary estate to Maria de Pourtales, now Maria de Grubissich.
- Feb. 29, 1876, Ben Holladay made an agreement with the Frankfort Committee containing covenants of further assurance of conveyances to perfect title to properties intended to be conveyed to the Oregon and California Railroad Company.

July, 1879, Firm of Ben Holladay & Co. dissolved by decree of the Supreme Court and Holladay decreed thereby to pay to S. G. Elliott \$20,-633.00 and C. Temple Emmet \$8,596.00, and the real estate herein involved not being mentioned in the proceedings. The suit was commenced while yet the legal title to this property stood in the name of Ben Holladay & Co. The decree of the Supreme Court was entered in July, 1879, and all testimony taken subsequent to March 28, 1870.

July, 1887, Ben Holladay died at Portland, Oregon, leaving his widow, Esther Holladay, his son, Ben. C. Holladay, his daughter, Linda H. Dorey, and this defendant, his granddaughter, aged about 16 years.

Oct. 11, 1887, Last Will of Ben Holladay admitted to probate in Multnomah County, Oregon.

Sept. 10, 1900, Estate settled and administrator discharged. Estate nowhere took any notice, either in inventory or otherwise, of the property involved in this suit.

June, 1908, H. Conlin appointed acting Land Agent of Oregon and California Railroad Company, but came into its service October, 1905, and while in its employ became familiar with the state of this title.

July 1, 1910, H. Conlin requested to resign and his resignation accepted.

March 13, 1911, Action in ejectment commenced by Maria de Grubissich against Oregon and California Railroad Company to recover the lands in controversy.

April 25, 1911, Bill of complaint by way of cross bill filed by Oregon and California Railroad Company against this defendant.

Affidavit of Ben Holliday filed in the case of John Nightengale, Simon G. Elliott, against Oregon and California Railroad Company and Oregon Central Railroad Company, and so *filed June 22, 1871*, and subscribed and sworn to before Ralph Wilcox, clerk, *June 22, 1871*. (Pages 1475-1508, trans. Complainant's Ex. 52.)

Stipulation of parties, case of John Nightengale and Simon G. Elliott against Oregon Central Railroad Company and Oregon and California Railroad Company, known as Exhibit 21 of that record and complainant's Exhibit 53 this record, (Pages 1508-1516 transcript) whereby parties stipulated that Exhibit 10 of the bill in the Nightengale case is Exhibit "G" in the answer filed by Ben Holladay as President of the Oregon and California Railroad Company, which also sets out and refers to copy of the minutes of March 28, 1870, and refers to the agreement between the Oregon Central Railroad Company of Salem and Ben

Holladay & Co., found in the minutes of that company of date March 28, 1870.

Amended bill of complaint, Nightingale case filed *August 11, 1873*. (Pages 1516-1539 trans.)

Answer of Oregon Central Railroad Company and Oregon and California Railroad Company in Nightengale case, complainant's Exhibit 61-a, filed *October 5, 1874*. (Pages 1548-1614 trans.) Exhibit "G" of that answer, complainant's Exhibit 61-b, pages 615-617 transcript. Exhibit "M" in the answer in the Nightengale case contains the communication of Ben Holladay & Co. to the Oregon Central Railroad Company of March 28, 1870. (Pages 1618-1649 trans.) Last named Exhibit "M" contains all of the minutes shown in the meeting of March 28, 1870, held by the Oregon Central Railroad Company, at which Ben Holladay & Co. submitted written proposition for the sale of these lands and the acceptance of same by the Oregon Central Railroad Company, together with the preliminary agreements which accompanied and characterized Exhibit "G" of the answer, which is the conveyance set out in the minute book of March 28, 1870, and set out in the bill of complaint in this suit brought against Maria de Grubbissich by way of cross bill to quiet the title of the Oregon and California Railroad Company.

ERRATA—ORIGINAL BRIEF.

“A. C. Cunningham” should be “A. G. Cunningham,” page 101.

Last word “or”, last line, page 105, should be “of.”

“Carey v. Williams, 79 Fed. 906,” page 121, should be stricken out, and “Fish, Receiver, v. Smith, 73 Conn. 377-391,” inserted.

“Sell,” line 15, page 157, should be “he sold.”

“Principal,” line 18, page 162, should be “principle.”

“Live,” line 1, page 167, should be “true.”

“Their,” line 9, page 168, should be “then.”

“Alive,” line 1, page 211, should be “alien.”

“Assisting,” line 1, page 211, should be “bringing.”

“Statue,” line 14, page 230, should be “statute.”

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT.

THE OREGON & CALIFORNIA RAILROAD COMPANY, a Corpora- tion,	<i>Complainant and Appellant,</i>
VS.	
MARIA DE GRUBISSICH, NEE MA- RIA DE POURTALES,	<i>Defendant and Appellee.</i>

APPELLEE'S BRIEF IN REPLY TO SUPPLE-
MENTAL AND REPLY BRIEF
OF APPELLANT.

The seven days allowed by Rule 24 to appellee to prepare, print, serve and file answering brief, after receiving appellant's opening brief, made it utterly impossible in this case to await the service of appel-

lant's brief before preparing and printing the brief of appellee. Appellant's assignment of errors did not advise or forewarn as to what questions appellant's counsel would argue; and it was only by recurring to the proceedings in the District Court that we were able to anticipate and answer the propositions presented in appellant's original brief. We make this statement by way of apology for what may seem an excessive reference to, and length of discussion of, questions raised by appellant's counsel in the two briefs they have now filed, and which we have now for the first time had an opportunity to answer.

We submit at the outset that in all of the 322 pages of briefs which they have presented, appellant's counsel have not pointed out a single instance where, in the decision and decree of the District Court, an "*obvious error has intervened in the application of the law, or some grave mistake has been made in the consideration of the facts.*"

Furrer vs. Ferris, 145 U. S. 132;

U. S. vs. Haskins, 181 Fed. 963;

Bliss vs. Washoe Copper Co., 186 Fed. 824;

De Laval vs. Iowa Dairy Co., 194 Fed. 423.

Aside from the numerous misstatements of fact and misquotations of authorities in both of appellant's briefs (to which we called the Court's attention at the hearing, and which appellant's counsel still persist in); the repeated dogmatic assertion of conclusions drawn by counsel from their own theories and con-

jectures, and then referred to by them as “the *evidence* just referred to” (Appellant’s first brief, p. 54), and “certain matters of evidence in the records,” (*Ib.* p. 110), the principal point which counsel have attempted to make with reference to appellant’s claims is that the District Court erred in not admitting the minute book of the Oregon Central Railroad Company (Complainant’s Exhibit 7), and the pleadings in the *Nightengale suit*, as competent evidence to prove the former existence, execution, and contents of the alleged lost document; and they make a general and sweeping claim of error in this respect, and in the face of all principle and all authority upon the subject that those documents are incompetent and inadmissible in this suit, because they are manifestly within the elementary and fundamental rule of evidence which excludes self-serving statements and hearsay.

POINT I.

Appellant’s counsel would first avoid the consequences of the rule by denying the rule itself. (See pages 115, 145, of their first brief.) And to support their contention that there is no such rule, and their statement that “*Corporate records are admissible as evidence against third parties even though they are self-serving*” (Appellant’s first brief, p. 145), they cite and *misquote* the following cases which are directly and decisively opposite to their contention. (See brief, pp. 121, 140, 145) :

Carey vs. Williams, 79 Fed. 906;

First Baptist Church vs. Harper, 191 Mass.
196; 77 N. E. 178;

Wheeler vs. Walker, 45 N. H. 358.

And they also cite in support of the same *Thompson on Corporations* (2nd ed.), and refer to sections of that author not dealing with the question, but omit to refer to section 1854, which states the rule as follows:

“ Aside from the general rule as to admissibility of corporate records to establish certain matters, as already suggested, the general rule is that such records are not admissible against a member of the corporation as proof of his private contracts and dealings with it. The reason of this rule is that a mere stockholder is not a member of the corporation in the sense that he is liable for the corporate acts; nor is he an agent of the corporation; nor has he any direct power of control over its actions or over the manner of keeping its records. He cannot therefore be treated as if in privity with the corporate records in order to charge him with knowledge of their contents, and to make their recitals evidence against him.”

Then, admitting the rule, counsel would neutralize its effect by contending that it is so mutable under the force of exceptions that it has no virtue. They undertake to state exceptions, such as that it does not apply to the case of a stockholder holding or controlling a majority of the stock,—the principle of which ex-

ception, if it were sound, would not vary the rule, *but would annihilate it*. And they then attempt to state exceptions predicated upon premises which are not supported by any facts shown in the record, and at page 116 of their first brief state:

“Where corporate records appear regular, and are produced from the proper custodian, and the party to be affected by their introduction was present and made the record, they are clearly competent upon two grounds: *First*, corporate records required to be kept; *Second*, because they constitute admissions made by the party participating or knowing their contents.”

Counsel in their opening brief attempted to establish the following propositions:

(a) That there was a “close relationship” between Ben Holladay and the corporation; that Ben Holladay was a majority stockholder, and that since a majority stockholder can control the affairs of a corporation, in such case the distinction between the individual and the corporate entity is broken down, and whatever is written upon the record books of the corporation in its own favor, and adverse to the majority stockholder, is competent evidence to dispose of the rights of the latter in any case where the corporation asserts a claim against him.

(b) That since Ben Holladay or rather Ben Holladay & Co., was a majority stockholder, although

not an officer or director of the corporation, the court should assume, without proof of the fact, that Ben Holladay was present at the meetings of the board of directors, and controlled the actions of the board, and assented to all that was done by the board on behalf of the corporation; and that he must therefore be presumed to have been familiar with and to have assented to all that was written in its records as the minutes of such meetings.

(c) That it is shown by evidence *aliunde* that Ben Holladay was familiar with what was written in the minute book, and particularly with what appears to concern the alleged lost document, and that he should be held to have acquiesced in and assented thereto, because more than a year after the dates of the transactions purporting to be narrated in the book he made an affidavit in which he referred to a deed from the Oregon Central to the Oregon & California Railroad Company, and to the recitals therein, and some of which recitals purport to be of matters copied from the minute book relating to a meeting of the *stockholders* of the Oregon Central R. R. Co.—although not in the slightest or remotest degree related to or connected with the alleged document; and also, that, it appearing by said minutes that Ben Holladay was present and voted at said *stockholders' meeting*, and at which the action of the *board of directors*, at a meeting held by them previously, cancelling the contract between Ben Holladay & Co. and the Oregon Central R. R. Co., for the construction of the road, was considered

and ratified, Ben Holladay should be held to have been acquainted with and to have assented to and ratified all that was written in the minute book purporting to narrate the business transacted by the *directors* at their previously held meeting.

And from the foregoing circumstances and inferences the Court is urged to imply an admission by Ben Holladay that the purported copy of the alleged lost document written in the minute book is a true and correct copy of an original which he had executed and delivered; and using such admission as evidence of the fact—including, of course, proof of signature—the Court should conclude that the document was executed and delivered, as pleaded in the bill.

To the *first* of these propositions (a), we ask, What has the question of “close relationship” got to do with the competency of the minute book? It is undoubtedly true that where a corporation writes down in one of its books, or elsewhere, a contract between itself and one of its stockholders, and the stockholder assents to the terms of such contract as so written, *upon proper evidence of his assent thereto*, the book is, to the extent of proving the terms of the contract, competent evidence against the stockholder. So it would be against a person not a stockholder. *But, if the contract were one involving the transfer of real property, or any interest therein, it would, under the statute of frauds, require the signature, and proof of the signature, of the transferor.* Showing circumstances from which it might be inferred that the stock-

holder afterward knew that the corporation had written in its minute book what purported to be a *copy* of such a contract, is no evidence to prove signature, or execution. There is no authority anywhere for claiming that it would be.

If an equitable estoppel were pleaded and relied on, the circumstance of such knowledge by the stockholder might be material and competent as having a tendency to prove grounds of estoppel; but no such issue has arisen, either upon the pleadings or the evidence, in this case.

Conditions like those above stated furnish an exception, and the only exception, to the rule excluding the books of a corporation when it is sought to use such books to prove a claim on behalf of the corporation against one of its stockholders. The authorities supporting the rule itself have been quoted and cited at page 47 of our first brief. There are no facts or circumstances in this case which furnish ground for such exception to it. The relationship of Ben Holladay, as a stockholder, to the corporation, has nothing to do with this or any other question in the case. His relationship to the Oregon Central Railroad Company by virtue of his being a stockholder in it was just the same as that of any stockholder in any corporation. *It is precisely to conditions arising from such relationship that the rule applies. It was created and exists for the specific purpose of protecting the stockholder in that relationship.* The fact that a stockholder has or controls a majority of the stock does not change or

vary the rule. There is no authority holding that the rule is variable according to conditions shown as to the amount of stock a stockholder owns or controls. The rule has its foundation and being primarily, naturally, logically, and necessarily, in the fact that a corporation is, in law, a person or entity entirely distinct from its stockholders.

Thompson on Corporations (2nd ed.), Sec. 1854.

And the law does not permit the corporation, or those who seek to benefit from its corporate existence, and distinct legal entity, to affirm that fact when they see an accruing advantage to themselves from so doing, and to deny it when it seems opposed to their interest.

As to the *second proposition* (b), at page 113 of their brief, appellant's counsel, discussing the admissibility of the minute book (Ex. 7), say:

"The court, however, must examine these pages before it can decide whether or not they are to be excluded. After so doing it will be clear that Ben Holladay was present at the meeting of the stockholders and directors of the Oregon Central Railroad Company, as are recorded on the pages above referred to, and that he was in control of and directed the whole proceedings. If this is so, why should these records be, in a court of equity, considered as self serving evidence? That they are not will be presently shown."

As before stated, Ben Holladay was never an officer or director of the Oregon Central company, and there is nothing stated in the minutes showing that Ben Holladay was ever present at any meeting of the *board of directors*. Appellant's counsel know this perfectly well. If counsel would show any valid premises from which the legal conclusion might be drawn that Ben Holladay had knowledge of, or assented to, or ratified what was written in the minute book respecting the alleged lost agreement, they must do so exclusive of their bald and unsupported statement that there is evidence that Ben Holliday was present at the meeting of the directors, the minutes of which purport to embody a copy of such agreement, for their statement that he was so present is utterly without foundation in fact, so far as the evidence in this case discloses the facts. It is, of course, mere idle jargon which counsel indulge in when they say that the Court should find that all of their inferences and deductions, drawn from the book itself, as to Ben Holladay being present at the meetings of the directors, and of knowing what was afterwards written up as the minutes of such meetings, and of his assenting thereto, are supported by the contents of the book itself, and that by reason of such inferences and deductions the book is rendered competent. Lifting one's self by one's own bootstraps has long been known to be an impossible feat. Counsel ask why, if certain things are stated in the book, the records should "be, in a court of equity, considered as self serving?" Why, indeed, should not anything offered to a "*a court of equity*" be accepted as the truth,

if the probability of its truth is insistently urged by counsel? If a purported deed or agreement from A to B is offered as evidence of a transfer of title, in "*a court of equity*," according to counsel's notion of the equity jurisdiction, the benevolence of the chancellor and his supposed disposition to seek to make everybody happy, and to satisfy the wishes of all who make claims, but have no evidence to support them in a court of law, ought by this token to move the court to admit the deed in evidence, without proof of its execution or genuineness, because, wouldn't the instrument offered as a deed itself say that A had conveyed to B? What further proof should a "*court of equity*" want as to the fact of such a transfer of title, or in order to dispose of the rights of A, than the fact that the instrument which was offered as a deed itself said so?

Appellant's counsel seem unable, or unwilling, to comprehend the proposition that it is an established principle of equity jurisprudence that courts of equity are governed by the same rules of evidence as are courts of law; and that courts of equity are as strictly confined to the exercise of the already settled principles of the established system of equity jurisprudence as courts of law are confined to the administration of the positive rules prescribed by statutes and the principles of the common law. Courts of equity do not create new principles or make new rules for every case, nor do they undertake to arbitrate the facts of

any case without regard to the established rules of legal evidence. As the court said in

In re Jessup, 81 Cal. 423,

“We are not appointed to decide cases alone, but to settle principles first, and second, to decide cases according to those settled principles as applied to the facts presented in the cases.”

In *Pomeroy's Eq. Jur.* (3rd ed.), Sec. 47; 59-60, it is said:

“It is very certain that no court of chancery jurisdiction would at the present day consciously and intentionally attempt to correct the rigor of the law, or to supply its defects, by deciding contrary to its settled rules, in any manner, to any extent, or under any circumstances, beyond the already settled principles of equity jurisprudence. Those principles and doctrines may unquestionably be extended to new facts and circumstances as they arise, which are analagous to facts and circumstances that have already been the subject matter of judicial decision, but this process of growth is also carried on in exactly the same manner, and to the same extent, by the courts of law. Nor would a chancellor at the present day assume to decide the facts of a controversy according to his own standard of right and justice, *independently of fixed rules*;—he would not attempt to exercise the *arbitrium bona viri*; on the contrary, he is governed in his judicial functions by

doctrines and rules embodied in precedents, and does not in this respect possess any greater liberty than the law judges."

We do not think that the court could or would reach the conclusion it is urged to by appellant's counsel, even if it were to accept as proof of appellant's claims all of the matters and theories counsel seek to hold to its view, and without first subjecting what is tendered in the way of evidence to the applied test of the rules of legal evidence,—if the court were to "attempt to exercise the *arbitrium bona viri*"—; and we realize that the court will think it supererogatory for us to take up its valuable time in the discussion of questions which are governed by such elementary and fundamental principles as we have here called attention to—principles in which the very life of the court exists. But this case is an important one, and the insistence of appellant's counsel in seeking to have it decided outside of established principles of law and equity, and the settled rules of evidence, seems to call for a reference to first principles, and frequent recurrence to which is the greatest safeguard against error.

Coming next to the third proposition (c), counsel for appellant again at page 118 of their first brief, say:

"It is clear from what has been hereinbefore stated, that the signing of the agreement of March 28, 1870, by Ben Holladay was contemporaneous with the making of the records appearing upon

pages 160 to 208 of Exhibit 7, (pages 393-440 transcript, Vol. 1). A reading of these pages will show that Ben Holladay had knowledge of all matters herein set forth."

Counsel's statement, and his reference to evidence to support it, that Ben Holladay knew or assented to what is written in the minute book, again begins and ends with the book itself. The book even does not show that Ben Holladay was present at the meeting of the directors, the minutes of which refer to the alleged lost document; *and there is not a scintilla of evidence anywhere in the record, of any shade or quality, to show that Ben Holladay was present at such meeting, or that he knew or assented to what was embodied in those minutes with reference to the alleged lost document.*

Reference is made by counsel (appellant's first brief, page 112, *et seq.*) to what purport to be copies of other communications and agreements between Ben Holladay & Co. and the Oregon Central Railroad Company found on the pages of the minute book. These copies are referred to by counsel at various places in their brief and discussed just as though they were actually proven matters of fact in the case, whereas no attempt or pretense whatever was made to prove them, or to lay a foundation for giving secondary evidence of their contents. At page 115 of Appellant's first brief will be found the following startling statement:

"The events recorded upon the pages immedi-

ately preceding and immediately following the pages upon which this alleged copy of the alleged lost agreement is set out, and which have been discussed hereinbefore, clearly and logically show that such an agreement was executed and delivered, and that in the absence of any other evidence in the record, the Court would be justified in so finding. The minutes are *prima facie* evidence of the facts set out therein."

And it is to statements of this sort that counsel afterwards refer as "the evidence just referred to," and "certain matters of evidence in the record." (See their brief, pages 54, 110).

In further endeavoring to neutralize the effect of the rule rendering incompetent the minute book, counsel refer to the minutes of a meeting of the *stockholders* of the Oregon Central Railroad Company held on March 28, 1870, which recite that a resolution was passed at such meeting ratifying the action of the board of directors, at a meeting which they had previously held, cancelling all contracts existing between said railroad company and Ben Holladay & Co.; deciding to make a transfer of said railroad company's property to the Oregon & California Railroad Company, and to settle up its business and go into voluntary dissolution. And the minutes further recite that Ben Holladay was present as a *stockholder*, and voted at such *stockholders' meeting*. Here again counsel assume that "the books were admissible evidence to

prove the very fact on which their admissibility depended."

Mudgett vs. Horrell, 33 Cal. 25;

Carey vs. Williams, 79 Fed. 906.

It nowhere appears that the minutes of the meeting of the *board of directors* at which the action referred to was taken, and as those minutes now appear in the minute book, were before the stockholders, or read at their meeting. We cannot travel outside of the records of these various meetings as shown by the minute book, if we are to use the book at all, and presume something which is different than, or not shown by its contents. How the information that the board of directors had taken the action referred to was brought before the stockholders at their meeting, subsequently held, does not appear. It may not be presumed that it was done by presenting the minutes of the meeting of the directors, as they now appear to have been written in the minute book, when the minutes of the meeting of the *stockholders* do not show that that was done, or that any stockholder then had knowledge of what now appears on the pages of the book as the minutes of the *directors'* meeting.

Granting, for the sake of argument, that the directors took action cancelling the contracts with Ben Holladay & Co., and that such action was pursuant to an agreement made therefor with Ben Holladay & Co., the latter cannot be charged with knowledge of, or of having assented to the terms of such agreement as

written in the minute book by some clerk or scrivener employed by the railroad company for that purpose, unless it is affirmatively shown by evidence *aliunde* that Ben Holladay actually saw and read those minutes as they now appear in the minute book, and assented to and ratified the same. *Non constat* the agreement between Ben Holladay and the Oregon Central Railroad Company may have been very different from anything such clerk or scrivener may have written as the minutes of the directors' meeting, and purporting to embody the terms of such agreement. No one can be held to have been a party to an agreement, or to have assented to or ratified the terms thereof as written by the other party in his own records or memorandum book, without it being proved definitely and affirmatively that the party sought to be charged with an obligation or liability under such agreement did actually see and read and know the terms thereof as so written, and that he assented to, or ratified the same. And if the agreement involved the transfer of the title to real property, or any interest therein, as it is claimed the alleged agreement in this case does, *proof of his signature thereto would have to be made*. This is elementary, and it is the veriest sophistry which appellant's counsel indulge in when they argue that these sound and wholesome and thoroughly established principles are not applicable to the facts and controlling as to the issues in the present suit.

Counsel's contention in this respect is refuted by the very matters appearing on the pages of the minute

book itself. They have said at page 118 of their first brief that "the signing of the agreement of March 28, 1870, by Ben Holladay, was contemporaneous with the making of the records appearing upon pages 160 to 208 of Exhibit 7." This is, of course, an entirely gratuitous statement by counsel, for there is nothing but the minute book itself to tell when the minutes were made up or written in the book—and the book don't tell. There is a physical and natural condition present, however, which does tell, indubitably, that the minutes of the directors' meeting as they now appear in the book were not written therein at the time the *stockholders'* meeting was held; and that they were not written therein contemporaneously with any signing of the alleged agreement of March 28th, 1870. Assuming, for the sake of discussion, the correctness of the minutes of both meetings it appears that the directors' meeting was held at *six o'clock* p. m. of March 28, 1870. It must be assumed that the minutes of that meeting were made up and written after the meeting was held. The stockholders' meeting was held at *seven o'clock* p. m. of the same day—one hour after the directors' meeting was called to be held. The minutes of the directors' meeting cover from pages 158 to 190 of the minute book—42 pages of close pen and ink writing, and all in the same handwriting; and pages 392 to 440 of the printed record—48 pages. The Court will, we think, take judicial notice of the fact that it would have been a physical impossibility for those minutes to have been written up between the time the directors' meeting was called at six o'clock, and after

they had finished their business, and seven o'clock, when the stockholders' meeting was called.

This much we *know*: That those minutes which are now found in the book were not seen by Ben Holladay at the time it appears by the book that either the *stockholders'*, or *directors'*, meetings were held. We know things only as they appear to us. What they are below the appearances—if they are anything—is absolutely unknown to us. Not only is the thing itself unknown, but it is unknowable. Whether or not Ben Holladay ever saw the contents of the minute book cannot be known, for there is not a shred of proof in the record to show that he ever did. He may have. It is neither impossible nor improbable that he did: It is also possible and probable that he did not. But it would be absurd to suppose that any court would, after complainant has waited forty-one years before making any claim to this land based upon the alleged lost document, and which it seeks to have established by means of such suggestion and inference, decree that defendant's legal title of record should be wrested from her upon that kind of speculation. It does not answer the purpose for appellant's counsel to say, "How can it be said that Ben Holladay did not assent to what is stated in the minutes of the directors' meeting," as they now appear in the minute book. The question which must be answered is, What *proof* is there in the record that Ben Holladay did? And the answer is, *there is no proof*.

And also, it is as certain as anything in this world

can be certain, that there is no evidence of any character in this case to prove that the alleged instrument was ever executed. Even if the minute book were received in evidence, attended by all of the surmise and conjecture of appellant's counsel, as to the possibilities or probabilities of what Ben Holladay may, or may not, have known or done with respect thereto, it would be impossible to glean from it even a straw of proof tending to establish the *execution* of such a document; *and such was the finding of the Chancellor.* The learned jurist before whom the cause was heard in the District Court, in his decision (Rec., p. 84), very cogently says: "Moreover, even if the complainant company has established by competent evidence the existence and loss of the original sufficient to authorize the admission of secondary evidence of its contents, *it offers no evidence to show that the instrument was in fact executed. If it had produced the original agreement it would not have proved itself, but it would still be incumbent on the complainant company to prove that it was in fact signed by Holladay, or Holladay & Co. (Carey vs. Williams, supra.)*" (Our italics.)

As an evidence of how far appellant's counsel have allowed their imagination to carry them in making frequent inaccurate and unwarranted statements in their brief, we call the Court's attention to the following on page 78 of their first brief—referring to exhibit 26, certified copy of deed from Oregon Central to Oregon & California:

"When we have before the court a certified

copy of this agreement of March 29, 1870, between the Oregon Central and Oregon & California Railroad Company, there can be no ground for asserting that the minute book of the Oregon Central containing the record of both of these agreements was a fiction, or that there is no evidence that any of these agreements or records were ever made. This agreement of March 29, 1870, between the Oregon Central and the Oregon & California R. R. Co. having been conclusively proven to be a reality, destroys all argument that could be produced by defendant against the verity of the records of the proceedings as is set out on pages 150 to 208 of Exhibit 7."

The "agreement of March 29, 1870," referred to, is a bilateral agreement made between the two railroad companies preliminary to a transfer by the Oregon Central of all of its property to the Oregon & California R. R. Co., as consummated by the deed, Exhibit 26. That agreement is recited in the deed. There is no certified copy of the agreement offered in this case. There is a certified copy of the deed, which recites the agreement.

"The recitals in a recorded deed, or bond, will bind no one except the grantors and those claiming under them by grant subsequent to the recitals."

Stumpf vs. Osterhage, 94 Ill. 115;
13 *Cyc. of Law & Pro.*, 612.

Of course, *even if this recital had been of something copied from the minute book*, it would not be competent evidence in favor of complainant and against this defendant in this suit. But that agreement (which is dated March 28, 1870, instead of March 29), as recited in said deed, *was not copied in to said deed from the minute book, and does not purport to have been*. The recital in the deed is that it was copied from the original instrument, and not from a copy in the minute book. (See Record, page 1306, line 14 from top, to bottom of page 1315). It is perfectly obvious that the agreement has nothing to do with the present case, or with the alleged lost document; and that the deed itself is utterly irrelevant and incompetent.

Counsel's apparent purpose in attempting to thus represent the fact is to make it appear that Ben Holladay, by a reference to the deed, Exhibit 26, and to the recitals therein, in an affidavit which he made June 22, 1871, (Exhibit 52; Rec. p. 1475, *et seq.*), admitted that he had knowledge of the contents of the minute book; and that, it being shown that he referred to the deed which contained recitals of matter copied from the minute book, it is to be presumed from this that he also had knowledge of, and assented to, that portion which refers to the alleged lost agreement.

Great stress is laid by appellant's counsel upon this circumstance, as they have depicted it, particularly at page 70 of their first brief. They insistently urge that in this affidavit Ben Holladay has admitted the authenticity of the alleged lost document, as written in the

minute book, although it is as clear as daylight from reading the affidavit that no such admission can possibly be deduced from it. Ben Holladay undoubtedly admitted knowledge of the deed from the Oregon Central to the Oregon & California Railroad Company. It was of record, and every person on earth had constructive knowledge of it. But it is difficult to see how, by reference in his affidavit to the copy of that deed attached to the bill of complaint in the Nightengale suit he made anything stated or recited in the deed an admission against himself, or his interest; or how he admitted anything in relation to it other than that it was a copy of the deed of which it purported to be a copy, and that its legal effect was such as it in fact was. He certainly did not thereby admit knowledge of the contents of the minute book, or the correctness or authenticity of anything stated in it, other than what the deed purported to show; and there is not the slightest connection between anything stated or recited in the deed and the alleged lost document. This is so clearly demonstrated by a reading of the affidavit and the deed that it is not arguable.

What is stated in Ben Holladay's affidavit, and everything that is stated in it, which counsel refer to and have tried to torture, by way of inference, into evidence of any admission by Ben Holladay that he knew and assented to what was written in the minute book (Ex. 7), having purport to the alleged lost document, is quoted at page 50 *et seq.*, of appellant's "Supplemental and Reply Brief." Counsel profess to read

a recondite meaning in the language so quoted; but we think it quite obvious that if counsel were not mentally predisposed and super-susceptible to such meaning, or its effect, they could not possibly find it in the affidavit; and we think that no one not actuated by a strong desire and inclination to find support for an obviously weak cause would ever think of so interpreting it. The affidavit of course speaks for itself, and it does not need a red herring drawn across the trail, in pursuit of proof of the execution and contents of the alleged lost document, to destroy the scent.

POINT II.

It seems, from their supplemental brief, that counsel have, when examining the authorities supporting the rule making the minute book (Ex. 7), incompetent, been impressed by language found in some of the cases, as, for instance, in *Carey vs. Williams*, 79 Fed. 906, that "The books and records of corporations . . . cannot be used to establish claims or rights of the corporation against third persons, *unless pursuant to the sanction of some statute.*" And counsel, to meet the situation suggested, bring forth an eleventh hour theory that the desired statutory sanction is found in sections of *Lord's Oregon Laws*, which they quote at page 19 of their supplemental brief. According to the interpretation counsel would have the court place upon these statutory provisions, and for this special purpose, particularly section 6691, to the effect that the directors "shall appoint a secretary, whose

duty it shall be to keep a fair and correct *record of all the official business of the corporation*," anything which the secretary might write in the books kept by him for the corporation, no matter whether it was a record of the "official business of the corporation," or a purported copy of a deed or written contract claimed to have been executed by some person other than the corporation, would, upon the mere production of the book, be primary evidence against such person that he made and executed such purported deed or contract; and the statute would thus compel such other person to have his rights disposed of by what the secretary might write, or cause to be copied into the corporation's books,—unless he were able to sustain the burden of showing it to be false. Not even in the dark ages would such a doctrine have been tolerated.

In this respect counsel would give to the records of a *private* corporation far higher evidentiary character and value than is given by law to records kept by an officer of a public corporation, and which the law specifically requires to be kept.

Of course the language used in *Carey vs. Williams* means that such books may by statute be expressly made primary and presumptive evidence for certain purposes, as is done by statute in Colorado:

"Such books shall be presumptive evidence of the facts therein stated, in any suit or proceedings against such corporation, or against any one or more stockholders."

Mill's Ann. Stat. (Colorado), Sec. 508.

It is upon the above statutory provision that the case of

Zang vs. Wyant, 25 Colo. 551,

frequently cited and referred to in appellant's briefs, was decided.

The Oregon statute referred to bears no analogy to the Colorado statute, and can have no similar meaning ascribed to it. And of course no statute anywhere provides that a private corporation may, by its secretary, or some other officer or employee, write what purports to be a copy of a deed or written contract to convey real property in its records, and then use such records as primary evidence to prove the execution and contents of such deed or contract.

Neap & Muckel, 136 ap. rev. (N.Y.) 241

But pursuing their contention in this behalf, counsel at page 28 of their supplemental brief say: "By the overwhelming weight of authority these minute books . . . were competent primary evidence, and are made so, in our judgment, by statute." At page 17 of their same brief they cite 28 alleged authorities as supporting this "weight of authority," not one of which gives any tenableness, in any degree, to their contention.

Professing to see a new light in the rule which renders admissible the records of a corporation "for the purpose of showing that the corporation passed the

vote recited, adopted the resolution recorded, or enacted the by-laws spread out upon the minutes—whenever under the frame of the issues it becomes material or relevant to show that fact,” (*Thomp. Corp.*, 1st ed. Sec. 7740), counsel contend that since the records may be used for such purpose, then they must of necessity be admitted to prove the actions or writings of another party and with reference to which the corporate action narrated in the record was taken, because, they say, how else could it be shown what action the corporation took? That counsel’s new light is an *ignus fatuus* is well illustrated in

Edwards vs. Bates, 117 Fed. 537,

where the same theory was attempted to be availed of.

Counsel also seek to obliterate the distinction between the records of a public corporation, kept by a public officer who is appointed for the very purpose of making and keeping public records which shall serve as evidence, and those of a private corporation whose internal affairs the statute, which is its creator, prescribes rules to regulate; and they seek to draw a parallel between the records of the former and the records which the statute makes it the duty of the secretary of a private corporation to keep “of all the official business of” the latter.

In its final analysis counsel’s contention amounts to just this: If the secretary of a private corporation in making a record of “the official business of the corporation” embodies therein a purported copy of a

deed or contract between the corporation and a third person, and in a suit between the corporation and such third person the corporation desires to prove the execution of such deed or contract, and likewise prove its contents, it only needs to prove its own "official business"; and that since proof thereof might be made by the records kept by its secretary, the introduction of such evidence would necessarily carry with it proof of the actions and writings of the third party with reference to which the "official business" was done. It seems not to have occurred to counsel that the "official business" of the corporation would not be relevant (for example) to prove that it accepted or executed on its behalf such deed or contract until it had been proved that the deed or contract had been made and executed by the other party to it.

In support of their argument on this proposition counsel have cited

Wigmore on Evidence, Sec. 1074 and 1661, and they quote from Section 1074, as follows:

"The record is not somebody's hearsay to the act; it is the act itself."

But counsel omitted the rest of the paragraph, which is as follows:

"This rule, however, though not disputed, sufficed only to admit what was actually done as a

part of the corporate meeting; *it still did not serve any purpose of proving matters that occurred apart from the meeting*, such as the sale of goods, the erection of a fence, the receipt of money, the subscription to shares, and the like."

And we invite the court's attention particularly to section 1661 of Wigmore, and what is said in subdivision (b) thereof.

The case of *Harrison vs. Morton*, 83 Md. 456, to which appellant's counsel call special attention bears no analogy upon the facts to the case at bar, and is in no sense an authority in support of their theory. In that case the corporation was not a party (not even a "quasi" party). Harrison sold a patent to Morton, and afterwards sued Morton for damages for breach of contract. Morton's defense was that Harrison had no title, as his predecessor (the inventor), had sold the same patent to the Barrel Company. It appears that it was shown that the inventor had subscribed for \$90,000.00 of the Barrel Company's stock, but it does not appear that the minutes were offered or used to prove that fact. They were admitted, however, to "show that the stockholders agreed to and ratified the proposition of the inventor to subscribe for \$90,000.00 of the company's stock and pay for his subscription by an assignment of his said patent."

We cannot, of course, attempt to analyze all the numerous cases appellant's counsel have cited; but after examining all of them we are unable to find a

single one which is any more closely in point with counsel's contention than those to which we have called attention. By reason of their widely different facts and distinguishing features, the cases cited by counsel lend greatly more support than opposition to the rule stated and applied in *Carey vs. Williams*, and the numerous other cases cited at page 53 of our first brief.

And it is, of course, impracticable for us, and it would be an imposition upon the time and labor of this Court, to attempt to traverse all the similar by-paths leading to nowhere which appellant's counsel have asked the Court to follow. Counsel have travelled far afield in their attempt to execute a flank movement against the established rules of legal evidence by which their claims in this suit are met and opposed; and in doing so they have made it very obvious how little faith the appellant company itself ever had that the title to the property here involved was ever transferred, or intended to be transferred to it by Ben Holladay, and why counsel thought it would be advisable to attempt to gain a title by adverse possession in another corporation—the *land company*,—and why “*inasmuch as there was no record title it would be inadvisable to stir the matter up, and that we would just fence it, and assert our possession in that way, and I presume to take advantage of the statute of limitations in that case.*” (Rec., p. 847).

We have discussed in our former brief the *answer* in the Nightengale case, which appellant's counsel

have placed so much reliance on, and we believe nothing further can be said, and certainly nothing further need be said, to show that that answer is grossly incompetent and cannot be admitted as evidence on behalf of complainant in this suit.

Appellant's counsel have argued in their supplemental brief (pp. 24, 44), that Ben Holladay was a "quasi party" to the Nightengale suit. The term is evidently one of their own invention, and its meaning is somewhat obscure. Apparently they are attempting to seize hold of the rule of law that where one, though not a nominal party, is nevertheless the real party in interest, he is estopped and bound by an adjudication of the subject matter of the suit. What appellant is now claiming in this suit was in no sense the subject matter or an issue in the Nightengale suit. Counsel say at page 26 of their reply brief that Ben Holladay "would be estopped to dispute those proceedings which he then defended." They have not made it clear just what "proceedings" they mean. Is it that Ben Holladay would be estopped to deny what the plaintiff in that suit alleged in his bill; or to controvert what the defendants set up by way of denial of the plaintiff's claims, because Ben Holladay was the real party in interest, having a right as an individual "to make defense, or to control the proceedings; and to appeal from the judgment?" (App. reply brief, p. 25). If the latter, then we submit that there is neither facts, nor principle, nor authority, to show or for holding that Ben Holladay bore any such charac-

ter in relation to that suit, or that his status as being a party in interest was any different from that of any other stockholder in the appellant company. And if counsel mean that Ben Holladay would be estopped by any judgment or decree rendered in the Nightengale suit, then there is no evidence in this case that any decree or decision was ever rendered in the Nightengade case. Counsel will have to find a principle yet unborn to support their absurd theory in this behalf; and no better proof of its untenableness as a legal proposition could be needed than what this very court has said in the case counsel have cited to support it:

Kamm vs. Rees, 177 Fed. 20.

POINT III.

We frankly admit that we believe a great deal of this court's time has been unnecessarily consumed in discussing the question of proof of the alleged lost document, when the execution and contents of such a document might have been admitted without injury or prejudice to defendant's status as to the ownership and title of the land involved, or her position in this suit. Even if appellant had established, by competent evidence, the execution and contents of that mythical and apocryphal document, what then?

Attention is called in our first brief to the fact that, no matter in what character the court might view such an instrument, if it were established, it could not and

does not contemplate the transfer or conveyance of any property other than of the copartnership of Ben Holladay & Co.; and not only has appellant failed to prove that the land here in question was the property of the copartnership, but the evidence shows conclusively that it was not. See particularly on this point,

Robinson Bank vs. Miller, 153 Ill. 244-255.

Appellant only seeks to claim the property on the theory that it belonged to the copartnership. The allegations of the bill and the evidence leave no room for discussion on this point; and the alleged instrument itself precludes any question as to there having been any other grantor named in it than the copartnership of Ben Holladay & Co.

“ In order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee, and that merely signing, sealing and acknowledging an instrument, in which another person is grantor, is not sufficient.”

Bachelor vs. Brerton, 112 U. S. 396.

See also:

Johnson vs. Goff, 116 Ala. 648; 22 So. 995;

Devlin on Real Property, Secs. 194-204;

Note in 23 *Am. St. Rep.*, p. 82.

This question was raised and fully discussed by de-

fendant's counsel in the District Court, and appellant's counsel did not there, and they have not here, attempted to answer it. The reason they have not is obvious—*over live coals you glide fast*. The proposition is unanswerable; and it forms an insuperable barrier to appellant's claims and contentions in this suit. This statement is advisably made with special reference to the last paragraph on page 65 of appellant's supplemental brief. It is there denied, and the authority given, that a deed made to "Ben Holladay & Co." conveys to and vests the legal title in *Ben Holladay*. Only two cases are cited for "weight of authority." In the second one,

Adams vs. Church, 42 Or. 272; 70 Pac. 1037,

and which we cited in our first brief at page 121, counsel say, "it was held that a conveyance of real estate to a partnership passed the title to the individual members of the firm, as tenants in common"; but they omitted to add, "they both being named in the conveyance," (*Steel & Adams*), as was fact in that case.

In the other case cited, *Kelley vs. Bourne*, 15 Or. 476; 16 Pac. 40, it is said in the syllabus:

"In an action to quiet title, the defendant claimed under a conveyance to a partnership in the firm name, 'Grant's Pass Real-Estate Association.' *Held*, that while the deed might be insufficient to convey the legal title to the partner-

ship, it was valid as a contract to convey, and vested such an equitable title in the partnership as would defeat plaintiff's title, acquired subsequent thereto."

And these cases are cited as constituting "weight of authority." If by accident, it is regrettable—if by design, then following my oral complaint of misleading references in the original brief, it is inexcusable.

And what of the instrument itself? It is admittedly not a conveyance. If it was ever made it was not sufficiently esteemed or valued to be preserved, either as evidence of an agreement to convey this, or any other, real property. It was never recorded, and of course could not be. It is not shown to have *ever been in the possession of appellant company*, (or the Oregon Central Company); and it is shown *not to have been* in appellant's possession, or known to exist, at least since 1883, or 1884, when the record book, Exhibit 8, was commenced to be kept.

By what sort of logic can it be reasoned that Ben Holladay on the one hand, and the board of directors of the Oregon Central Railroad Company on the other, intended the alleged instrument to operate as an agreement to convey the land in question, and yet omitted ever to effectuate such intention, or to preserve the document as evidence thereof? It is not claimed by appellant's counsel, and there is nothing in the record to indicate, that the parties mentioned did not understand the proper manner of drafting and

executing deeds conveying real property. There is nothing either pleaded or attempted to be proved to indicate that any accident or mistake might have supervened, nor is there any reason shown or suggested why, if the parties intended that this land was to have been conveyed, such an intention could not, or would not, have been effected by the simple and ordinary means of making and executing a formal deed.

The whole question here is, of course, one of intention; and the intention must be read from the instrument itself, construed in the light of the relation and conduct of the parties toward it.

The sole ground upon which appellant's counsel urge the admission in evidence of the incompetent minute book (Exhibit 7), is that, as they contend, Ben Holladay dominated and controlled both the firm of Ben Holladay & Co. and the Oregon Central Railroad Company—both parties to the alleged agreement—and that whatever intention there may have been on the part of the board of directors of the latter was only the reflection of Ben Holladay's intention and will. And it appears by the minute book that at the directors' meeting at which it is contended the alleged document was presented to and accepted on behalf of the company, there was present as counsel and legal adviser of the board of directors no less a personage than the late Senator John H. Mitchell, a lawyer of national fame.

If Ben Holladay were now alive and given an op-

portunity to say what was his intention in executing the alleged lost instrument, if he did execute it, what would he say? Can there be any doubt but that he would say that if he intended to convey this property to the railroad company he would have done so, and by means that would have left no room for uncertainty as to his intentions, and that he would have observed and obeyed the law in doing so? And if Senator Mitchell, and the men who constituted the board of directors of the Oregon Central Railroad Company, when it is alleged the document was delivered and accepted by the latter, could be called back to life to be interrogated as to whether they accepted such a document as the one pleaded expecting or intending that it conveyed to the company the title to this land, what would they say? *What could they say?*

The intention of the appellant company is not, of course, a factor to be considered in construing the alleged document; but is only to be considered in connection with the "Frankfort Committee Agreement." It is the intention of Ben Hollaady and the directors of the Oregon Central company that is to be looked to in determining the effect of the alleged lost document in any relation claimed for it to this land.

Appellant's counsel have at page 109 of their opening brief argued, with as much force as we could possibly have done, that *it was not Ben Holladay's intention* to convey this land to the Oregon Central Railroad Company. They have sought to introduce in evidence what has been referred to as the "Frank-

fort Committee Agreement," made February 26, 1876, between Ben Holladay and a committee representing the bondholders of appellant company. (Counsel apparently misapprehended the necessary effect of such a document upon their contentions in this case, for it militates against their position from every conceivable point of view.) By that agreement Ben Holladay sold out his entire holdings in appellant company, and completely severed his relations with it. It contained a stipulation which was both in substance and effect *a demand upon Ben Holladay that he should convey to appellant* "any real estate, or other property, or rights, which equitably belongs to said companies or any of them (if any such rights or property there be), but which may now be held by *or stand in the name of said Holladay*, or any other person or persons or corporations in trust, having been purchased for said corporations, or conveyed to him for their use." (Rec. p. 629). Of course the title of this property then stood, and still stands, in Ben Holladay's name upon the records—except as it has been affected by the administration of his estate.

With what promptitude and avidity appellant company sought to avail itself of any rights accruing to it under this stipulation, and to exact compliance on the part of Ben Holladay with the demand couched in its terms, is shown by the deed obtained from Ben Holladay, and wife, (Defendant's Exhibit 3; Rec. p. 1672), executed in the City of New York on March 4, 1876,—six days after the alleged making of the

“Frankfort Committee Agreement”—“to all and every the lands and real estate situate in the County of Multnomah in said State of Oregon now in the actual occupation or possession of the said party of the second part under claim of title thereto and ownership in fee simple thereof.” If the alleged lost document was, as alleged in the bill, delivered to appellant company by the Oregon Central company, or if it in fact ever existed, of course appellant knew what, if any, right it had or claimed in the land here involved under such document at the time the “Frankfort Committee Agreement” was made; and it was charged with notice from the county records that the legal title to the land stood in Ben Holladay, and that appellant could not change that record by the alleged lost instrument, because *it was not a deed, and it conveyed no title*; and of course could not be recorded; and that in order to vest the legal title in appellant company and secure to it the benefit of the recording act it would be necessary for it to either obtain a deed from Ben Holladay, or bring suit against him to compel a conveyance, or to quiet title. *It never sought to do either.* It had eleven years during which Ben Holladay lived after the making of the “Frankfort Committee Agreement” within which to do so, and if it believed it had any rights in this property subject to the demand made up Ben Holladay by that agreement. And the fact that Ben Holladay did not recognize any duty on his part to convey this property in response to such demand, was a clear and unequivocal denial by him that appellant had any right

to a conveyance thereof, and a disavowal of any intention that it was ever to be conveyed to the Oregon Central company.

Appellant is bound by the record of titles, and the constructive notice imparted thereby; and if, as its counsel have claimed for it in this case by the allegations of their bill—notwithstanding their utter failure to prove the fact—the alleged lost document was in its possession from March 29, 1870, until the San Francisco fire of April 18, 1906, then it certainly knew whether or not it had or claimed any rights in this land springing from that document, and whether Ben Holladay was either legally or equitably obligated to comply with the demand made upon him by the “Frankfort Committee Agreement” to make a conveyance to it of the legal title, when that agreement was made. That agreement represented a balance struck, and an account stated between the parties to it; and whether or not appellant claimed, or Ben Holladay admitted, any right of appellant to a conveyance to it of this land was determined by the demand made by that agreement, and its scope as recognized by Ben Holladay, and as then sought to be enforced by appellant company.

The facts supporting this proposition are so irrefragable, and the truth which inheres in it is so plain, so inevitable, and so unavoidable, that any attempts by appellant’s counsel to oppose it, either with flat denial or with reptatory statements or argument, are necessarily futile. It encompasses every issue sought to

be created by appellant in this suit, and is a complete answer and an undeniable refutation of all of its claims based upon the alleged lost document.

But appellant's counsel have apparently been forced by the logic of their own argument to admit the proposition and its necessary effect, for at page 109 of their opening brief they say:

"Another reason why it was possible that a deed could not have been secured at this time is, on this same date Ben Holladay was retiring as officer and director of the Oregon & California R. R. Co. It appears that the company was having trouble with Mr. Holladay (See top of page 969 transcript, Vol. II), who was still in control of the company at this time, and that it was the desire of other members of the company to adjust these difficulties by buying Mr. Holladay's interest. From this there appears to be a good and sufficient reason why the Oregon & California R. R. Co. *could not safely ask Mr. Holladay for a deed to these lands for the reason that their so doing could have been construed as admitting that the lands in dispute in this cause before the Court and any others that had not been specifically described, did not belong to the Oregon and California R. R. Co., and that they were not intended by the parties to the agreement of March 28, 1870 (the alleged lost agreement) to be so conveyed.*"

Note—How about the lands in Multnomah county, to which the company procured a deed from Ben Holladay and wife, executed March 4, 1876, while the latter were in New York? Ben Holladay apparently didn't sulk about complying with the demand of the agreement in that instance, or hesitate to convey to appellant company what it claimed as enuring to it, or what he recognized as belonging to it, under the terms of settlement which the agreement contained. Appellant had nothing but the alleged lost agreement pleaded in this suit, if it had that, *and which its counsel in this suit admit was not a deed, and did not transfer the legal title*, and which could not be recorded, to base any claim of right to the land upon. How else could it obtain a transfer of the title to the land than by a conveyance from Ben Holladay, given by him either voluntarily or under compulsion?

A persuasive argument, indeed, for counsel to make, that appellant company did not have enough faith in any claim it may have made to the land to dare to seek a conveyance of it from Ben Holladay during his lifetime; but only felt safe in asserting a claim to it *twenty-five years after his lips were sealed in death*.

The land had no possible use to the Oregon Central company, or to the appellant company, in any connection with the construction, maintenance, or operation, of their railroad; or with any business in which they were authorized by their charter powers to engage. The bill of complaint alleges, and appellant's

counsel have apparently exhausted their ingenuity and power of argument in an effort to show that the land was purchased by Ben Holladay & Co. in order to obtain the timber from it to use in the construction of the "first twenty miles" of the railroad of the Oregon Central company; and that all of the timber had been cut and removed from the land, and used for that purpose, on December 24, 1869. Of course, it is proved to a demonstration that Ben Holladay & Co. did not purchase the land to obtain the timber on it—they having already purchased the timber, and to a great extent removed it, when the land was deeded to Ben Holladay "& Co."; but it is not questioned that all of the timber was removed on December 24, 1869. There is no reason shown or suggested why, after the timber was removed, the railroad company should have wanted to have the land conveyed to it; nor why Ben Holladay should have wanted to convey it to the railroad company. *There is no evidence of any possession taken by the Oregon Central company, or by complainant, or of any acts or incidents of asserted ownership or possession done upon or with reference to it by either company until after Ben Holladay's death, nor until 1889, or 1890—when complainant's agent examined it to ascertain its selling value.*

And it appears that the complainant company never made any claim whatever to the land, at any time, based upon the alleged lost document, until after it had abandoned it to the Land Company, to allow the

latter to gain a title to it by adverse possession; and after the commencement of the action in ejectment by the holder of the legal title of record—the defendant in this suit—disturbing the continuity of the adverse possession.

It was at this juncture that Mr. William D. Fenton, one of appellant's counsel, and who had previously advised the company that it had no title to the land, and that it would, for that reason, be advisable to enclose it with a fence and try to obtain a title to it by adverse possession (Exhibit 36; Rec. p. 1347), apparently conceived the idea of utilizing the alleged lost document, as it purports to be copied in the minute book, as a hook upon which to hang a claim to the land; *and it has remained for Mr. Fenton, forty-one years after the alleged making of the document, to first discover and read from it an intention on the part of Ben Holladay and the directors of the Oregon Central Railroad Company, that it should operate as an "agreement" to convey this land to the latter; and to attempt its restoration and recrudescence as a means of attacking the legal title of record, which has stood unchallenged all those years, and which appellant company, acting through the same counsel, had been unable, through the medium of the land company, to destroy and obliterate by means of the statute of limitations.*

POINT IV.

At the top of page 24 of their supplemental brief, counsel for appellant say:

"But this instrument was sufficiently stamped, as a simple contract. It was not a conveyance, deed, or other such writing. It was not witnessed, acknowledged, or sealed, and was not a specialty. It was, as it appears to be, a simple contract."

This is an express admission *in judicio*, and stands as a conclusive presumption of law.

1 *Greenleaf's Ev.*, Sec. 27;
Marsh vs. Mitchell, 26 N. J. Eq. 500;
The Harry, 11 Fed. Case No. 6147;
Peteler vs. N. W. Mfg Co., 61 N. W. 1024.

Such an admission made in a brief is as binding as though made in a pleading.

Moore vs. Murdock, 26 Cal. 515;
Eddy vs. Newton (Tex. Civ. Ap.), 22 S. W.
 533.

It seems to us too clear to be arguable that if it had been proved by competent evidence that such a document was ever made and executed, and if it could be interpreted, as counsel contend, to have been an agreement to convey the legal title of this land, and notwithstanding it requires *reformation* to be decreed upon it before it could be specifically enforced in equity, any cause of action which appellant might have had to either have it reformed, or to compel a specific enforcement of it, is barred by the statute of

limitations of the State of Oregon, and by appellant's laches.

By a sort of rushing and jamming tactics appellant's counsel have sought to raise a dust which should envelop and obfuscate this proposition, and they have many times repeated that the Oregon Central Railroad Company and the appellant company entered into and have remained in possession of the land since March 28, 1870. The record is absolutely barren of any thing even called evidence by appellant's counsel to support or justify such a statement; and of course no one will be misled or thrown off their balance by it, no matter how often repeated. In making the statement counsel have never once referred the court to anything in the record which would justify or excuse them in making it, except in their supplemental brief, at page 63, they make a pretense of finding something in the record which purports to give it color. They refer to the testimony of J. T. Apperson (Rec. p. 678), that "After the timber had been practically devastated from this tract of land that the mill was torn down from its location and moved to Canemah and set up there and for a number of years was operated in the interest of the railroad company in cutting ties and timber for the Oregon & California Railroad, and was operated by Gardner Elliott." Just preceding this, the same witness was asked and answered:

Q. Do you recall, or do you not recall, that it (the Oregon Central R. R.), was completed by the 24th

day of December, 1869, to Parrott Creek,—that is the first twenty miles?

A. My recollection is that it was just completed the day before the expiration or limitation of the grant, and I was, I think, present at the celebration.

.

Q. Now I will ask you to state to the court what the fact is, if you know, whether or not all of the bridge timbers, ties, and material, that this mill cut on this land were used for the construction of this road, then owned by the Oregon Central Railroad Company?

A. I will state in answer to that question that the whole of it was used for that purpose. I think the mill was maintained there for that purpose."

It is upon such evidence as this that counsel base their statement at page 63 of their supplemental brief that

"This not only shows that the mill was operated on these premises until after the completion of the road, but that after the timber was cut, the mill was moved to Canemah, presumably by the Oregon & California Railroad Company, and operated by that company,—clearly showing a manual, physical delivery of this property to the Oregon & California Railroad Company, thus described and identified by this mill."

They say the mill was moved to Canemah "presumably" by the Oregon & California R. R. Co. The number of presumptions which counsel ask the court to indulge in appellant's favor, after it has waited forty-one years, and the parties and witnesses are dead, before asserting its alleged equitable claims to this land, are unlimited. There is no evidence in the record to show by whom the mill was removed, *nor when it was removed*. And it is just as fair to *presume* that it was removed before March 28, 1870, the purported date of the alleged lost instrument, as after.

It was testified by one of appellant's own witnesses, on direct examination by appellant's counsel (Rec. p. 97), and we are entitled to have the fact so found, that the mill was a small one, a "portable mill. There was just sheds put up there. There was no mill put up, only just a shed put over the machinery."

Counsel also in making this statement overlook two important facts which cannot be disputed. (1) That the mill was placed upon the land under a leasehold right in Ben Holladay & Co., a copartnership, and belonged to the latter, whereas the fee of the land belonged to *Ben Holladay*. (2) That the alleged document under which it is claimed the mill was sold by Ben Holladay & Co., and pursuant to which it was "presumably" removed, was a "*simple contract*," "*not a conveyance, deed, or other such writing*," and the sale of the mill thereby was the sale of personal property, specifically designated as such in the al-

leged "simple contract" and gave no right to any one, whoever it may have been who purchased and removed the mill, with respect to the land, other than to go upon it for the purpose of removing the mill.

Hughes vs. Edisto Cypress Co., 51 S. C. 1;
28 S. E. 2.

Counsel have stated also, at page 64 of the same brief, that the deeds from Grindley and Elliott to Ben by appellant that they were in its possession at a later Holladay & Co. "appear to have been in the possession of the Oregon Central Railroad Company and the Oregon & California Railroad Company," etc. The statement so made is wholly misleading. There is no evidence that the deeds were ever in the possession of the Oregon Central Company. It appears by the record book, Exhibit 8, which was begun to be kept in 1883 or 1884, that those deeds were entered therein as being in the possession of the appellant company, and it is shown by other records introduced period. When, or how, appellant got possession of them is not shown. They were duly recorded, and of course ceased to have any special value to any one thereafter, for the record was evidence of exactly the same value as the deeds; and it is merely absurdity to attempt to show any possession, actual or constructive, on the part of appellant, by reason of the fact that by some unexplained makeshift the deeds fell into the hands of one of its officers or employees.

And the possession which it is alleged Richard

Kochler, as receiver of appellant company, had of the land, consisted of his having listed it in a report he made to the court in the receivership dated March 31, 1885, in which he referred to this land as "Title in Oregon & California Railroad Company." (Rec. p. 1151). It is self-evident that this was a mistake, and that the title was not in the company; and the most that can be gathered from this incident is to infer that, the land having been assessed to appellant company for taxes, and the receiver having found it upon some list of lands assessed to the company, he assumed that it belonged to the company and included it as such in his report. It is impossible to account for his having rendered it as "Title in Oregon & California Railroad Company" upon any other theory. Mr. Koehler testified (Rec. p. 721), that he, as receiver, never had any possession of the land.

We regret to again find counsel stating on page 64 of the supplemental brief that "Ben Holladay testified that these lands belonged to Ben Holladay & Co. at one time, (page 875, transcript)." This statement is so far from the truth that a mere inspection of the record demonstrates its falsity.

We have quoted at page 172 of our original brief the statutes of limitations of Oregon. If the alleged document had been proved, and could by any sort of strained construction be held to be an agreement to convey these lands, of course appellant's alleged cause of action to compel specific performance of the agreement accrued March 28, 1870, and was barred by

the express terms of the statute (L. O. L., sec. 391), on March 28, 1880—unless appellant was in possession and protected by the proviso in that section. There is no evidence of possession taken or had by appellant during that period; nor at any other time until the land was fenced in March, 1905,—when the Land Company went into possession. There can be no dispute but that the Land Company was in possession at the time of, and for many years prior to, the commencement of this suit; and appellant cannot, under any circumstances, claim the protection of the proviso in section 391 of Lord's Oregon Laws.

We call attention to pages 23, *et seq.*, of our first brief for a statement of and reference to the facts concerning this question, and the authorities cited at page 174.

Appellant cannot therefore claim immunity from the bar of the statute by reason of any possession it had during the ten years following the time its cause of action for "reformation" and "specific performance" accrued. And the statute has run not once, but four times. By force of the statute any cause of action appellant might have had, equitable or otherwise, was barred, and was dead and extinct, ten years after March 28, 1870. Without showing a waiver by the parties entitled to invoke the bar of the statute, appellant could not thereafter, by any acts or incidents of possession done upon the land, galvanize into life its dead and extinct cause of action. If this is not so, then section 391 of Lord's Oregon Laws is

either a farce or a dead letter. It cannot be held to be meaningless, for no set of words were ever more pregnant with plain and obvious meaning than those which express the legislative intention in this statute.

And we call attention again in this connection to that we have said at page 136 *et seq.*, of our first brief, and in which we have demonstrated by the facts presented by the record in this cause that neither appellant company, nor its predecessor, ever paid, or agreed to pay, any consideration to Ben Holladay for the land.

Both by the statutes of Oregon and by the twenty-year rule in equity that

"Every new right of action, in equity, that accrues to a party, whatever it may be, must be acted upon at the utmost within twenty years,"

the appellant's right to maintain this suit is barred.

7 *Encyc. U. S. Sup. Ct. Rep.*, p. 980;

Lansdale vs. Smith, 106 U. S. 391;

Cases cited page 176 Appellee's first brief.

In *Norris vs. Haggin*, 28 Fed. 276, the court say:

"Upon a full consideration of the authorities, the established rule to be deduced from them appears to be that in those states where the statutes of limitations is made applicable to suits in equity as well as to action at law, where they em-

brace in terms the specific case, and in case of concurrent jurisdiction, they are, in themselves, as obligatory upon the national courts of equity, as such, as they are upon the state courts, and as they are in actions at law, and the court should act in *obedience*, rather than *upon analogy*, to them."

See also:

Raymond vs. Flavel, 27 Or. 219; 40 Pac. 158.

POINT V.

Appellant's position on the subject of adverse possession, as discussed in its briefs, is simply one of entreaty to the court to bestow upon it the ownership and title of this land, because it says it has claimed it for a long time—although its claim was not based upon a paper title, or color of title, or accompanied by possession. Appellant's counsel have by their own evidence established the fact that appellant abandoned to the Land Company, in 1905, whatever claim appellant made to the land, and that the land company has since been in whatever possession has been claimed by any one by reason of the fence having been built around it in March, 1905, and has paid the taxes upon it, and has leased it to others, (see Complainant's Exhibits 63-4-5-6-7); and that this was done to avoid any title accruing to appellant company by adverse possession, and to prevent the land from becoming sub-

ject to the lien of the mortgage to the Union Trust Company of New York, Trustee, upon all of appellant's property. And then, in the face of this, their own evidence, and their own claims and contentions in this case, counsel tell the court at page 199 of their original brief:

“ From the testimony of B. A. McAllister it appears that the Oregon & California Land Company was simply a holding company for the Oregon & California Railroad Co. For this reason this incident should not have any bearing upon the question of ownership. These lands were the property of the Oregon & California Railroad Co. at the time these fences were built, and have been so owned since March 29, 1870, the time the Oregon Central Railroad Company conveyed the premises to the Oregon & California Railroad Company.

Very ingenious and subtle argument, this about a holding company. Holding companies have lately come into fashion. *But who holds the holding company?* There is no evidence to show that its stock is owned or held by appellant company; and counsel have made no pretense of showing by whom its stock is owned or held. And we feel safe in saying that if the fact had been shown it would have been found that not a share of the stock of the Land Company is owned or held by appellant company. Sometimes it is better not to prove facts—if they would when proved expose spuriousness of party's contention; best

to substitute assumption and insinuation in disingenuous argument of astute counsel. May be the court will be assured thereby, and adversary counsel may overlook omission to prove essential facts.

The Oregon & California *Land* Company is a corporation, having a capital stock of \$5,000.00 par value; and whatever land it holds the title or possession of is held for whoever owns and holds its stock. There is no presumption as to who owns its stock; and if it were owned by appellant company, it would not make the possession of the land company, at least for the purpose of gaining a title by adverse possession, the possession of appellant.

Counsel's statement at page 191 of their original brief that the appellant "and its predecessors in interest have since the 28th day of March, 1870, been in possession of the land continuously, openly, notoriously, and adversely to the claim of defendant, under color and claim of title," and their frequent reiteration of such a statement, is not even based upon good special pleading, let alone upon facts, and of course no one can or will be misled by such an utterly unfounded statement touching one of the fundamental issues in the case, no matter how often repeated.

Counsel have quoted and referred to numerous decisions on the pages of their briefs where they discuss adverse possession, but it is only necessary to glance at them to see how far they are from being in point. The law as to the requisite and necessary elements of

a title gained by adverse possession is thoroughly well settled. It is a noteworthy fact that counsel for appellant have not cited or referred to a single Oregon decision upon this subject. There are a great many decisions of that state touching the question, but every one opposed to appellant's contention in this case.

POINT VI.

The proposition advanced by counsel for appellant that the appellee, as tenant in common with the heirs of Ben Holladay, and who hold the legal title, and are the owners in fee of the land, are barred by the statutes of limitations, or laches, from defending their legal title and ownership against the claim of equitable rights now first asserted by appellant after more than forty-one years, finds no support anywhere.

Meier vs. Kelly, 22 Or. 136; 29 Pac. 265;

Farmers' L. & T. Co. vs. Denver, 126 Fed. 53.

And the further proposition stated at page 78 of the supplemental brief that "the court would be justified in presuming that the contract of March 28, 1870 . . . had been executed, without any proof to that effect," is not only novel, but it is amazing that counsel should lapse into making suggestions of this nature, in view of the character of this suit, the claims appellant makes in it, and the relief sought in the bill; and particularly the facts admitted on its behalf, both by its own conduct and by the statements of its counsel.

We call attention again to Exhibit 36 (Rec. p. 1347), wherein W. D. Fenton, leading counsel for appellant in the present case, and who was attorney for appellant company in March, 1905, and who at some time prior to that date advised appellant that it had no title to this land, and that it would be a good plan to enclose it with a fence and try to get title to it by adverse possession; and upon such advice then given by Mr. Fenton the land was fenced, and possession thereof was assumed to be taken by the Oregon and California *Land Company*, to which appellant company then *abandoned* any rights or equities which it thought it might have to it, and without any conveyance, or upon any consideration whatever. Of course, W. D. Fenton then knew who owned the land. He had investigated the title for the very purpose of ascertaining and advising the appellant company who owned it, and where the title stood; and he knew that it stood in appellee and the heirs of Ben Holladay—and *he knew where those heirs were to be found*. He didn't need to know that, however, for the purpose of commencing a suit on behalf of appellant company to establish any equitable ownership it had, or claimed to have, of the land. But a suit for that purpose was not thought advisable by Mr. Fenton, and would not serve the purpose he then apparently had in mind when he proposed that the company fence the land so as to initiate a title by adverse possession. If title had been established in appellant company by suit, or if appellant company obtained title by adverse possession, the land would at once be

come subject to the lien of the mortgage of the Union Trust Company, and would enure to the benefit of the bondholders under that mortgage. Mr. Fenton didn't represent the mortgagee, or the bondholders; and he did not *then* represent, as attorney, the heirs of Ben Holladay,—at least with reference to the title of this land. So a title acquired by adverse possession in the Land Company was the expedient to which he was driven in order to serve the purpose of his client. (If the stock of the Land Company were held or owned by the appellant company, then the property of the Land Company would, indirectly, be subject to the lien of the Union Trust Company mortgage; but it is not shown who owns or holds the stock of the Land Company.)

Now, one of the principal "equities" alleged in the appellant's bill of complaint is "permanent improvements thereon (the land) of the value of \$500.00 *all relying upon the said agreement and deed of date March 28, 1870*"; (Rec. p. 14), and again referred to at page 204 of appellant's original brief as "such permanent improvements," was the building of a fence around the land, by the advice and at the suggestion of Mr. Fenton, to initiate a title by adverse possession—in the *Land Company*; and it was this act of *good faith* which has probably inspired counsel to say at page 76 of the supplemental brief, "That the equities are with the complainant, and that the claim of the defendant is unconscionable, inequitable, and un-

just, and asserted after forty years of acquiescence, waiver, and delay."

Also, the payment of taxes by the Land Company, since 1905, while it was, without claim of right or color of title, trying to gain a title by adverse possession, is another thing which may have induced counsel to make that strong statement.

The same learned counsel, W. D. Fenton, has repeatedly in his briefs made personal allusion to one of defendant's counsel, Henry Conlin, with the only too evident purpose of attempting to asperse him in a cunning and reptant way. What Mr. Fenton has said on this subject is not based upon anything in the record, and is not only not true, but so far as the record contains anything touching it, is shown to be untrue (Rec. p. 822). Mr. Fenton is quite evidently guided by his own instinct in forming his judgment (if the statements he has made are based on judgment, and are not merely acrimonious), and he is no doubt willing to credit his own suspicions (based upon his instinct) of what might have been the fact, and without other evidence to prove it. But whatever may have been the suspicions, or the animus, of Mr. Fenton in repeating his allusions to Henry Conlin, he has unquestionably expressed the clear admission on behalf of his client, the appellant in this suit, and has made it signally apparent that the appellee and the heirs of Ben Holladay, who own the fee and hold the legal record title of this land, were in ignorance of their ownership of the land, and were kept in ignor-

ance thereof, so far as any actions or conduct on the part of Mr. Fenton or his client were concerned, until after "July 1, 1910, H. Conlin requested to resign and his resignation accepted." (App. sup, brf., p. 86.) (Counsel have made a slight error in dates here. H. Conlin was requested to resign May 18, 1910, his resignation to take effect July 1, 1910).

No one knows better than Mr. Fenton whether the appellee and the heirs of Ben Holladay were ignorant, and were kept in ignorance of their title to this land, and of which it was intended to despoil them by the adverse possession of the Land Company; and a statement coming from him to that effect, and based upon his knowledge of the matter, may well be regarded as authentic.

But after W. D. Fenton, as counsel for appellant, has made this clear admission in its behalf in this suit, it does not lie in his mouth, or in the mouth of appellant, to plead laches on the part of the defendant (appellee)—even if laches could under any circumstances be charged against the owner of the fee and the holder of the legal title of record, and where there has been no adverse possession. Nor does it lie in their mouths to ask the court to indulge presumptions in favor of a grant to appellant, based upon "forty years of acquiescence, waiver, and delay," on the part of defendant.

Acquiescence in, and waiver of what? What cause of action could defendant ever have had against the

complainant, other than the possessory action which she commenced, and which was seasonably brought, after possession was attempted to be taken of the land by enclosing it with a fence in 1905? This proposition is so utterly devoid of merit that it is not arguable.

Many years have now passed since the transactions, the incidents, and the circumstances could have occurred which appellant's counsel seek to show to the court, and out of the dim reflections of which they attempt to make appear the spectre of an equitable right. The mists of time, accompanied by the death of all the parties and witnesses, prevents any clear view being had of what may have occurred, or the reasons why. But the salient features of the case have not been obscured. The fact that the timber on the land was purchased by the partnership of Ben Holladay & Co., and was cut and removed by them by virtue of the title thereto acquired by the bills of sale thereof from Grindley and Showers, and that the subsequent deeding of the land to Ben Holladay & Co., and the vesting of the legal title and ownership in Ben Holladay was a transaction entirely distinct from the purchase of the timber, are matters of record, the evidence of which is just as fresh and potent today as it was forty-one years ago. And the fact that the title and ownership of the land remained in Ben Holladay and his heirs from that time until now, is established by the same character of proof. Beyond this there is little semblance of fact, and little to guide the truth seeking

mind but surmise and conjecture . We fail to see, however, where there is any reasonable foundation for surmising or conjecturing that the title of the land was ever intended to be conveyed to the appellant company when it was yet allowed to remain in Ben Holladay and his heirs, and of record, all of these years, without any attempt to give effect to such intention by either party.

We think that to one who has examined the voluminous record, and who has followed, or attempted to follow, the argument of appellant's counsel, and their various theories as to why it might have been intended by Ben Holladay that this land should have been conveyed to the Oregon Central Railroad Company, and in view of the fact that it was not so conveyed; the presumption that men do what they intend to do, and do not do what they do not intend to do; the only reasonable theory as to why appellant company, prior to the time the land company went into possession, claimed to own the land, is that when the land was first assessed for taxes, in the year 1873, the appellant company having a large quantity of lands which had been granted to it by Congress, through some error, no doubt induced by the association of Ben Holladay's name with the appellant company, the assessor included this land in the list with those assessed to the railroad company. The error was not corrected, and the land continued to be so assessed, and from this circumstance, and without any investigation by the officers or employees of appellant com-

pany who had charge of paying its taxes on its lands as to the title or ownership of this land, it was assumed to be land belonging to appellant. This theory is given additional support by the fact that Richard Koehler, when he was receiver of appellant company, listed the land in a report which he made as receiver, to the court, as land the title of which stood in the Oregon & California Railroad Company. He probably obtained his information about the land from the tax list. It was simply assumed by some officer or employee of appellant company that because the land was assessed for taxes to the company, it belonged to the company, and because the minds of such officers or employees were abused by that erroneous belief for a considerable period, appellant's counsel now think that the land should equitably belong to the appellant.

There is no limit to which a discussion of surmise and conjecture might be carried; but in as much as courts do not decide questions determining the title to real property upon the basis of such discussion, but upon proven facts, it would be idle to pursue the subject further.

Respectfully submitted,

HENRY CONLIN,

Attorney for Appellee.

IN THE
United States Circuit Court
of Appeals
for the Ninth Circuit.

THE OREGON AND CALIFORNIA RAILROAD
COMPANY, a corporation,
Complainant and Appellant,

v.

MARIA DE GRUBISSICH, *nee* Maria de Pourtales,
Defendant and Appellee,

WALTER S. ASHER, as Administrator of the
Estate of Maria de Grubissich, deceased,

and

ANTIONE DE GRUBBISSICH, Sole Heir at Law
of said deceased,

Substituted as

Defendants and Appellees.

The Oregon and California Railroad Company, complainant and appellant, respectfully petitions the court to grant a rehearing in this cause, upon the following grounds:

First: A majority of the court, in its opinion, while announcing the rule that a corporation's

books and records are evidence to prove its own acts, states that "they are not competent evidence against third persons to prove contracts with them, in the absence of proof that they knew and assented thereto." This rule as thus announced by the court, does not determine or decide whether the corporate records or minute books in the record, are not competent evidence to prove the execution of the written proposition of Ben Holladay & Company of date March 28, 1870, addressed to the President and Directors of the Oregon Central Railroad Company, by Ben Holladay & Company, and acted upon by the Board of Directors of that company on March 28, 1870, which said written proposition purports to be signed by Ben Holladay & Company, and which contains an offer upon the part of Ben Holladay & Company, if accepted by the Oregon Central Railroad Company, that Ben Holladay & Company shall surrender up, transfer, convey and deliver up to the Oregon Central Railroad Company "all mills, machine shops, machinery, tools, implements, horses, mules, carts, oxen, live-stock, and *all property of every name and description now owned by or standing in the name of Ben Holladay & Company, in Oregon, or in their possession, and intended for use in and about the construction of such railroad.*"

See pages 392 to 440, Volume I, Transcript
of Record.

It is respectfully submitted that the original minute book introduced in evidence in this cause, properly identified, is not only competent evidence that the company acted upon this proposition of Ben Holladay & Company, and made a binding contract on its behalf, but that Ben Holladay & Company submitted in writing the terms of such contract, which, when acted upon, became a binding obligation on both parties.

III Cook on Corporations, Sec. 714, 6th Ed.

II Modern Law of Corporations, Machin, Secs. 1120-1124.

Wigmore on Evidence, Secs. 1074, 1661.

Rudd v. Robinson, 126 N. Y. 113.

Harrison v. Morton, 83 Md. 475.

Boggs v. Lakeport Ass'n, 111 Cal. 354, 356.

Booth v. Dexter etc. Co., 118 Ala. 369.

Central Electric Co. v. Sprague Electric Co., 120 Fed. 925.

Colfax Hotel Co. v. Lyon, 69 Ia. 683-689.

We respectfully ask the court to review these authorities and the Transcript of Record cited. It would seem to us to be anomaly in the law, that this minute book is competent evidence *to prove that the Oregon Central Railroad Company made the contract with Ben Holladay & Company, thus evidenced by its corporate action, and that at the same time such record did not tend to prove or establish that Ben Holladay & Company, the other contracting party, also submitted the proposition in writing, which, read in*

connection with the corporate action, is the contract between the parties. This, conceding the rule to be as contended for by a majority of the court, would be a well recognized exception to that rule. In other words, proof of corporate action by the minute book is necessarily and in and of itself proof of the contents of the written communication of March 28, 1870, and that Ben Holladay & Company submitted that written communication, and that its terms stated the contract between the parties. If this be so, then complete proof is made, not only of the document of date March 28, 1870, set out in the bill of complaint, and also set out in the majority opinion of the court (pages 3 and 4), and bearing date March 28, 1870, signed Ben Holladay & Company, C. Temple Emmet, by Ben Holladay, attorney in fact, and Ben Holladay & Company, by Ben Holladay, but is proof of the substantial terms of that contract, and made more definite and certain as being clearly applicable to "all property, of every name and description, now owned by or standing in the name of Ben Holladay & Company, in Oregon," which, by its general description, covers the real estate involved in this suit.

Second: It is respectfully submitted that the rule of evidence announced by the court, as applied to the minute books of a corporation, is modified by the Code of Oregon (Lord's Oregon Laws), Sections 695, 790, 6691, and 6694. Under these statutory provisions the minute books of

the Oregon Central Railroad Company, and of the Oregon and California Railroad Company, were competent primary evidence. These statutory provisions are not declaratory of the common law, but are intended to supplement and enlarge the rules of evidence as declared by the courts of common law.

II Thompson on Corporations, Sec. 1855,
2nd Ed.

Glenn v. Orr, 96 N. C. 413, 415.

The record in this case shows that the minute book containing the communication of March 28, 1870, and containing a copy of the agreement of that date purporting to be signed by Ben Holladay, C. Temple Emmet, by Ben Holladay, attorney in fact, Ben Holladay & Company, by Ben Holladay, is properly attested by the proven signature of the Secretary who kept the record. The Secretary is the officer authorized by Section 6691 of Lord's Oregon Laws, to keep a fair and correct record of all the official business of the corporation. It was shown in this case that the record was so kept, and that the recording secretary was dead. Under the express provision of Section 790, Lord's Oregon Laws, this evidence in writing thus made by the recording secretary, was primary evidence of the facts stated in the record thus required to be kept.

Third: It is respectfully submitted that Ben Holladay, through whom the defendants-appellees

claim, was bound as a *quasi* party to all that he did or caused to be done as President, or otherwise, in the case of Nightingale and Elliott v. Oregon Central Railroad Company and Oregon and California Railroad Company, and in the affidavit made by Ben Holladay and filed in that suit, known in the record as Exhibit 52. Both in the answer and in the affidavit Ben Holladay admits the execution of the agreement of March 28, 1870, and the proceedings shown by the minute book of the Oregon Central Railroad Company of that date, and there is a stipulation in that case that the copy in the record as an exhibit to the pleadings in that case, is a correct copy of the original. The rule is settled that all persons are parties who have a direct interest in the subject matter of a suit, and have a right to control the proceedings and make a defense, examine witnesses, or prosecute an appeal, although such parties are not nominally parties to the record. Ben Holladay was, in essence and effect, the Oregon Central Railroad Company, and was also the promoter and organized the Oregon and California Railroad Company, and he was the principal financial beneficiary of the transfer of the assets of the Oregon Central Railroad Company to the Oregon and California Railroad Company. It would be a strange perversion of justice to hold that Ben Holladay, as an officer of the Oregon and California Railroad Company, could make a declaration that he, Ben Holladay,

or Ben Holladay & Company, had made a certain agreement of date March 28, 1870, declared upon in this suit, and *that as Ben Holladay, or Ben Holladay & Company*, he was not bound by his communication and declaration of this fact.

24 Ency., pages 735-737, 2nd Ed.
 Kramer v. Singer Mfg. Co., 93 Fed. 636.
 Lovejoy v. Murray, 3 Wall. 1-19.
 Robbins v. Chicago Cy., 4 Wall. 657, 672.
 1 Greenleaf on Evidence, p. 523, 15th Ed.
 Green v. Bogue, 158 U. S. 478, 503.
 Tootle v. Coleman, 107 Fed. 41, Id. 57 L. R.
 A. 120.
 Kamm v. Rees, 177 Fed. Rep. 20.
 Litchfield v. Goodnow, 123 U. S. 549.

We respectfully ask the court to order a rehearing in this cause, particularly upon the three points suggested, and if the court shall be so advised, upon the whole case, in order that justice may be done to the parties.

Respectfully submitted,

WM. D. FENTON,
 BEN C. DEY,
 KENNETH L. FENTON,
Attorneys for Complainant and Appellant.

We do hereby certify that we have read the opinion of this court in this cause, dated July 17, 1913, and the dissenting opinion of Judge Ross filed on said date, and in our judgment and belief the petition for rehearing, upon the grounds stated therein, is well founded. We further certify that this petition for rehearing is not interposed for delay.

WM. D. FENTON,
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WM. F. HERRIN,
Counsel.

Dated September 25, 1913.